NAVAL WAR COLLEGE

# INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

1926

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# PREFACE

Since 1914 the publications of the Naval War College on international law have contained documents relating particularly to maritime affairs in the time of war. During this period various topics and situations have been discussed at the college. In the present volume some of these topics and situations are presented.

These discussions upon international law were, as in recent years, conducted by George Grafton Wilson, LL. D., professor of international law in Harvard University, under the auspices of the War College authorities.

J. R. POINSETT PRINGLE,
*Rear Admiral, United States Navy,*
*President Naval War College.*

DECEMBER 31, 1927.

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# INTERNATIONAL LAW SITUATIONS

## WITH SOLUTIONS AND NOTES

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### Situation I

#### CONTINUOUS VOYAGE

States X and Y are at war. Other States are neutral. The *Alta*, a private merchant vessel lawfully flying the flag of State Z, is bound for a port of State B, a State bordering on State Y. The *Alta* is visited on the high sea by a cruiser of State X. The cruiser finds on board fodder suitable for stock raised in State B. The supply of this fodder would, however, make possible the exportation of additional animal products from State B to State Y. The cruiser captures the *Alta*, alleging continuous voyage through substitution. Should the capture be sustained?

#### SOLUTION

The capture should not be sustained under the doctrine of continuous voyage.

#### NOTES

*Naval War College discussions.*—The doctrine of continuous voyage has received consideration at the Naval War College from time to time, and particularly in 1901 (International Law Situations, pp. 38–85) and 1905 (International Law Topics and Discussions, pp. 77–106). From the discussion of 1905 the conclusion was drawn that—

The actual destination of vessels or goods will determine their treatment on the seas outside of neutral jurisdiction.

*Treaty of 1674.*[1]—Early treaties contained provisions in regard to commerce; e. g., one to which there have been many references is the treaty between Great Britain and the United Provinces, December 1–11, 1674, Article II:

> Nor shall this freedom of navigation and commerce be violated, or interrupted by the reason of any war; but such freedom shall extend to all commodities which might be carried in time of peace; those only excepted, which are described under the name of contraband goods, in the following articles.

*Eighteenth century comment.*—The publications of the Navy Records Society relating to the law and custom of the sea, 1649–1767, edited by Marsden, quote from British documents:

> *1758. Holdernesse to Yorke as to the Dutch carrying on the colonial trade of the French.—S. P. Foreign, Holland 481, 21st July*
>
> * * * I have enlarged the more upon this point, as I could wish that it were better understood upon the changes of Rotterdam and Amsterdam, as I am convinced that they serve more to keep up the clamour against the English than other points of a more difficult nature—I mean the proper bounds that ought and must be set between interrupting the real fair trade of the Dutch, and suffering them to carry on the trade of the enemy in a manner that passes the bounds of the neutrality they profess. And this brings me to the last article I am to treat of upon this subject; I mean the visiting of Dutch ships at sea, and effectually preventing them from supplying the French colonies with necessaries, and carrying on for them a trade which they can not support themselves in time of war, and to which the Dutch are not admitted in time of peace. This is a point of real importance to the King's service, and of so great consequence that I am persuaded his Majesty will never be induced to desist from his just pretension * * * (Vol. 11, p. 382.)

Later in 1762, Murray, one of the law officers, wrote:

> * * * I think the order desired by the Dutch insidious, and the more improper as it proceeds upon a kind of reciprocity with Spain. I am of opinion that it should not be granted. I have thrown upon paper a sketch of the sense of an answer which I

[1] Some of this discussion may be found in 1921 Proceedings Am. Soc. Int. Law, pp. 45–55.

send your Lordship inclosed. If you approve the substance, you will change the form as you think fit. * * *

Dated 1st May, 1762.

(Ibid. p. 397.)

A memorandum given by France for guidance of Dutch merchants and published by authority in the Utrecht Gazette, July 8, 1756, states a principle revived by Great Britain in 1915:

ART. 7. If the Dutch ships carry any goods or merchandise of the growth or manufacture of the enemies of France, they shall be esteemed good prizes; but the ships shall be discharged.

N. B.—The regulation made in the last war permitted the Dutch to trade with the enemy, in conformity to the treaty of commerce made with the States in 1739. But as the King revoked that treaty at the conclusion of the war the goods of the growth or manufacture of England, or belonging to the English, which shall hereafter be found on board a Dutch ship, shall be declared good prize, unless the 14th article of that treaty should hereafter be renewed. (Marriott, Case of the Dutch Ships, p. 74.)

The rule is that if a neutral ship trades to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship and is liable to be taken. (Lord Mansfield in Berens *v.* Rucker, 1760, K. B. 1 Wm. Black, 314.)

The problem of continuous voyage, as it was understood in the middle of the eighteenth century, may be inferred from the statement of the case of Hillbrands *contra* Harden, 1761:

By the treaties of alliance betwixt Great Britain and Holland, particularly that of 1674, the liberty of navigation and commerce is secured to the one state even with the enemies of the other; and, excepting contraband goods, that no ship of either nation shall be searched for goods belonging to the enemies of the other, and that they shall be free to carry all goods which they can lawfully carry in time of peace, even supposing the whole cargo should belong to an enemy.

In the present war betwixt Britain and France, the power of the latter at sea has been so reduced as to oblige them for safety to carry on their whole commerce in Dutch bottoms. And if this plan can be carried into execution under color of the above-mentioned treaties, the British merchants lie under a great disadvantage; for their cargoes lie open to capture, while the French cargoes are free from it.

By edicts of the King of France, no goods can be exported from their colonies but in French bottoms. At present these edicts are suspended and the commodities of the French colonies are imported into France in Dutch bottoms. At least Dutch ships are employed within the narrow seas where there is the greatest risk of capture * * *. In short, French goods in a Dutch ship ought to be secure, where the Dutch ship is preferred as the better sailor, or as being hired at a cheaper rate. But where none of these circumstances occur, and that the Dutch ship is preferred for no other reason than to protect from capture, it ought not to have the benefit of the treaties. (Kames, Select Decisions, 242.)

*Early nineteenth century.*—Vessels of one state were sometimes allowed to carry on trade between their own ports and the colonial ports of another state. This trade was at times permitted to continue without molestation in the time of war, even though one belligerent had cut off the colonies of the other belligerent. Sometimes neutrals might be permitted to enter into previously closed colonial trade. These neutrals might also be engaged in trade with the belligerent country. Some merchants accordingly conceived the idea of bringing goods from the colony to a neutral state, and after discharging and passing the goods through customs there, they then reloaded and carried the goods to the mother country. For example, during the war between Great Britain and Spain in early nineteenth century transportation by the way of the United States from Spanish colonies to Spain under the United States flag was common. Goods were sometimes carried from the colonial Spanish port of La Guayra to Marblehead in the United States, were there entered under bond during slight repairs to the vessel, and then reshipped for Bilboa. On this last stage of the journey an American vessel was captured and taken to a British prize court, as engaged in trade between Spain and her colonies. Of this the court said:

The act of shifting the cargo from the ship to the shore and from the shore back again to the ship does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of im-

portation into the place where it is done. * * * The truth may not always be discernible, but when it is discovered it is according to the truth and not according to fiction that we are to give the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. (The *William*, 1802, 5 Rob. p. 387.)

This principle is related to the so-called rule of 1756 and sets forth the idea of continuous voyage as understood at the beginning of the nineteenth century.

*Lord Stowell's opinions.*—Sir William Scott, Lord Stowell, in the case of the *Immanuel* (1799), said:

But without reference to the accidents of the one kind or the other, the general rule is that the neutral has the right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking. (2 Rob. 197.)

Christopher Robinson in 1804, in reporting Sir William Scott's decisions, and discussing condemnations based on the so-called rule of 1756, said:

At that period there were no instructions, in which the principle was laid down; yet then the court did not hesitate to come to a conclusion on the illegality of such a trade. (Appendix A, 4 Rob. p. 8.)

Closed trade regulations were common during the nineteenth century. Even the coastwise trade of the United States was reserved to American vessels and later the same principle was extended to Porto Rico and the Philippines after they were acquired in 1898.

In 1810 Lord Stowell said in the case of the *Luna*—

I can not admit that, because the port of St. Sebastian's borders on ports which are blockaded, that therefore it is less accessible than any other port; the introduction of such a principle would have the effect of stretching out the limits of every blockade to an indefinite extent. (Edwards 190.)

*Robinson's comment.*—In commenting on continuous voyage in the early nineteenth century, Christopher Robinson, editor of British Admiralty Reports, said:

> There is one other remark, which the editor takes the opportunity of introducing here, as connected with that branch of the colonial principle which relates to *continuous* voyage. It is merely to point out to those, who may have occasion to observe upon the manner in which that extension has grown out of the original principle, a circumstance which appears to have hitherto escaped notice, viz, that it was in the first instance adopted as a rule of equitable construction in favour of neutral trade, in protection of that part of a cargo, which had gone from *Hamburgh* to *Bordeaux*, and was afterwards captured on the ulterior part of the voyage to *St. Domingo*. Those goods were contended to be liable to condemnation, under the instructions. They were excepted, however, by the interpretation which the court adopted, that the touching at *Bordeaux*, accompanied with *an entry*, and the *forms of exportation*, did not create such an incorporation into the commerce of *France*, as could render the destination of the *continuous* voyage liable to be considered, *as between French ports only.* (6 C. Rob. Note II.)

*Kent's opinion.*—Chancellor Kent, in 1826, said:

> It is very possible that if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate and which shall prove sufficient to render it expedient for her maritime enemy (if such enemy shall ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done the weight of the argument of the foreign jurists in favor of the policy and equity of the rule. (Commentaries (a), p. 229.)

*American Civil War.*—It was held in many cases before the American Civil War that the destination of the cargo followed the destination of the vessel. During the Civil War the destination of the cargo and of the vessel was separated. The early ideas had in view the transport from a closed colonial port; the later extension was applied to transport between neutral ports, if an ultimate enemy destination could be proven. As was said by the United States Supreme Court in the case of the *Circassian* in 1864:

A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as a prize from the time of sailing, though she intends to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination. (2 Wall. 135.)

As the doctrine of separation of liability of cargo and vessel had developed, this was applied in the case of the *Bermuda* in 1865, in which Chief Justice Chase said:

If by trade between neutral ports is meant real trade, in the course of which goods conveyed from one port to another become incorporated into the mass of goods for sale in the port of destination; and if by sale to the enemies of the United States is meant sale to either belligerent, without partiality to either, we accept the proposition of counsel as correct.

But if it is intended to affirm that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it. * * *

It makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of transportation of the cargo.

The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transshipments intervene * * * even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention, either formed at the time of original shipment or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at an intermediate port. (3 Wall. 514.)

This distinguishes the cargo and vessel and considers intention in relation to the ultimate destination of the cargo.

In the case of *The Peterhoff*, in 1866, the Supreme Court of the United States said as to blockade:

We must say, therefore, that trade, between London and Matamoras, even with intent to supply, from Matamoras, goods to Texas, violated no blockade, and can not be declared unlawful.

Trade with a neutral port in immediate proximity to the territory of one belligerent, is certainly very inconvenient to the other. Such trade, with unrestricted inland commerce between such a port and the enemy's territory, impairs undoubtedly and very seriously impairs the value of a blockade of the enemy's coast. But in cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence. (5 Wall. 28.)

In the same case reference was made to the contraband on board.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoras.

*The Springbok.*—Much difference of opinion was called forth by the decision of the Supreme Court of the United States in 1866 by which the cargo of the *Springbok*, a vessel which had sailed from London to Nassau, was condemned, though the vessel was seized when sailing between two neutral ports. The vessel itself was released. In this case the court said:

Upon the whole case we can not doubt that the cargo was originally shipped with the intent to violate the blockade; that

the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to the cargo, both in law and in intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing. (5 Wall. 1.)

Writing after but speaking of the period just before the American Civil War, Sir Travers Twiss, agreeing with the law officers of the Crown, as to the case of the *Springbok*, said:

Great Britain and the United States of America had until then been content to enforce against neutral merchants the confiscation of their property upon proof of some *constructive attempt* on their part to violate a blockade; it has remained for the younger sister, under her extraordinary difficulties, to initiate the doctrine of a *prospective intention*, on the part of a neutral merchant, to violate a blockade, and to subject him to the confiscation of his property not upon the *evidence* of any present voyage of the ship and cargo, in which the ship and cargo have been intercepted, but upon the *presumption* of a future voyage of the cargo alone to a blockaded port, after it had been landed from the ship at a neutral port. (Continuous Voyage, 3 Law Mag. and Rev. 4th series, p. 1.)

Many British authorities, as well as many continental writers, regarded the decision in the case of the *Springbok* as unsound.

A formal statement in 1882, with the names of such distinguished members of the Institute of International Law as Arntz, Asser, Bulmerincq, Gessner, Hall, De Martens, Pierantoni, Renault, Rollin, Travers Twiss, declared the *Springbok* decision—

subversive of an established rule of maritime warfare. * * * that it is extremely desirable that the Government of the United States of America, which has been on several occasions the zealous promoter of important amendments of the rules of maritime warfare, in the interests of neutrals, should take an early opportunity of declaring in such form as it may see fit, that it does not intend to incorporate the above propounded theory into its system of maritime prize law and that the condemnation of

the cargo of the *Springbok* shall not be adopted as a precedent by its prize courts.

Such a declaration was never made by the United States.

*The Institute of International Law.*—The Institute of International Law in 1882 included in the Regulations Concerning Prizes, article 44, a provision that: "In no case can the doctrine of continuous voyage justify condemnation for violation of blockade."

In 1896, however, the Institute said of contraband:

> Destination for the enemy is presumed when the shipment goes to one of the enemy's ports, or even to a neutral port which, from clear evidence or undeniable fact, is only a temporary stopping place in a commercial transaction having an enemy end. (Annuaire 1896, p. 231.)

*Hall's opinion.*—Hall, the English authority, writing of the American extension of the doctrine of continuous voyage, said in 1884 in a note to the second edition of his International Law:

> During the American Civil War the courts of the United States gave a violent extension to the notion of contraband destination, borrowing for the purpose the name of a doctrine of the English courts, of wholly different nature from that by which they were themselves guided. As has already been stated (§ 234) it was formerly held that neutrals in a sense aided in the hostilities of a belligerent by taking advantage of permission given by him to carry on a trade which was forbidden to them in time of peace. Property engaged to such trade was therefore deemed to be confiscable. During the Anglo-French wars of the revolution traders foreign to France or Spain were permitted to trade between French and Spanish ports and French and Spanish colonies, commerce with the colonies in question having before the war been restricted to trade with foreign ports and the colony. To evade the liability to condemnation in the English courts which entering into the new trade involved, neutral merchants endeavoured to give an air of innocence to their ventures by making a colourable importation into some port from which trade with the colony or the home country was permissible. Thus in the case of the *William*, (5 Rob. 385), a cargo taken on board at La Guayra was brought to Marblehead in Massachusetts, it was landed, reembarked in the same vessel with the addition of some sugar from

the *Havannah*, and within a week of its arrival was despatched to Bilboa. In this and in like cases the English courts condemned the property; but they were careful not to condemn until what they conceived to be the hostile act was irrevocably entered upon; cargo was confiscated only when captured on its voyage from the port of colourable importation to the enemy country. The doctrine upon which the English courts acted was called by Lord Stowell the doctrine of continuous voyage.

By the American courts during the Civil War the idea of continuous voyage was seized upon, and was applied to cases of contraband and blockade. Vessels were captured while on their voyage from one neutral port to another, and were then condemned as carriers of contraband or for intent to break blockade. They were thus condemned, not for an act—for the act done was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole—but on mere suspicion of intention to do an act. Between the grounds upon which these and the English cases were decided there was of course no analogy.

The American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country. On the confession indeed of one of the judges then sitting in the Supreme Court, they seem to have been due partly to passion and partly to ignorance. "The truth is," says Mr. Justice Nelson, "that the feeling of the country was deep and strong against England, and the judges, as individual citizens, were no exceptions to that feeling. Besides, the court was not then familiar with the law of blockade" (p. 624, n. 1).

The editor of the eighth edition of Hall, 1924, says of Hall's early position:

> This statement is not supported by the current American writers on international law.

*South African War.*—The doctrine of continuous voyage was put to the test through the shipment of goods on a German vessel, the *Bundesrath*, to a Portuguese port near the South African Republic, during the South African War in 1900. A British cruiser captured the *Bundesrath*. The German ambassador protested, saying in a note of January 4, 1900:

> With reference to the seizure of the German steamer *Bundesrath* by an English ship of war, I have the honour to inform your excellency, in accordance with instructions received, that the

Imperial Government, after carefully examining the matter and considering the judicial aspects of the case, are of opinion that proceedings before a prize court are not justified.

This view is grounded on the consideration that proceedings before a prize court are only justified in cases where the presence of contraband of war is proved, and that, whatever may have been on board the *Bundesrath*, there could have been no contraband of war, since, according to recognized principles of international law, there can not be contraband of war in trade between neutral ports.

This is the view taken by the British Government in 1863 in the case of the seizure of the *Springbok* as against the judgment of the American prize court, and this view is also taken by the British Admiralty in their Manual of Naval Prize Law of 1866.

The Imperial Government are of opinion that, in view of the passages in that manual: "A vessel's destination should be considered neutral if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral," and "the destination of the vessel is conclusive as to the destination of the goods on board," they are fully justified in claiming the release of the *Bundesrath* without investigation by a prize court, and that all the more because, since the ship is a mail steamer with a fixed itinerary, she could not discharge her cargo at any other port than the neutral port of destination. (Parliamentary Papers, Africa No. 1, 1900, Cd. 33, p. 6.)

On the same date Lord Salisbury informed the British ambassador at Berlin that he was—

entirely unable to accede to his (the German ambassador's) contention that a neutral vessel was entitled to convey without hindrance contraband of war to the enemy, so long as the port at which he intended to land it was a neutral port. (Ibid. p. 7, No. 18.)

On January 10, 1900, Lord Salisbury wrote:

It is not the case that the British Government in 1863 raised any claim or contention against the judgment of the United States prize court in the case of the *Springbok*. On the first seizure of that vessel, and on an *ex parte* and imperfect statement of the facts by the owners, Earl Russel, then Secretary of State for Foreign Affairs, informed Her Majesty's minister at Washington that there did not appear to be any justification for the seizure of the vessel and her cargo, that the supposed reason, namely, that there were articles in the manifest not accounted for by the captain, certainly did not warrant the seizure, more especially as

the destination of the vessel appeared to have been *bona fide* neutral, but that, inasmuch as it was probable that the vessel had by that time been carried before a prize court of the United States for adjudication, and that the adjudication might shortly follow, if it had not already taken place, the only instruction that he could at present give to Lord Lyons was to watch the proceedings and the judgment of the court, and eventually transmit full information as to the course of the trial and its results.

The prize court of the United States, in a long and considered judgment, decreed confiscation both of the vessel and the cargo. The owners applied for the intervention of Her Majesty's Government, and forwarded in support of their application an opinion by two English counsel of considerable eminence.

The real contention advanced in this opinion was that the goods were, in fact, *bona fide* consigned to a neutral at Nassau. It can not, therefore, be adduced in support of the doctrine now advanced by the German Government. But Her Majesty's Government, after consulting the law officers of the Crown, distinctly refused to make any diplomatic protest or enter any objection against the decision of the United States prize court, nor did they ever express any dissent from that decision on the grounds on which it was based.

The volume which is described in Count Hatzfeldt's note as "The Manual of Naval Prize Law of the British Admiralty," and from which Count Hatzfeldt quotes certain phrases as expressing the view of the lords commissioners on this subject, is, in fact, a book originally compiled by Mr. (now Sir Godfrey) Lushington, which was published under the authority of the lords commissioners as stating in a convenient form the general principles by which Her Majesty's officers are guided in the exercise of their duties; but it has never been asserted and can not be admitted to be an exhaustive or authoritative statement of the views of the lords commissioners. The preface to the book states that it does not treat of questions which will ultimately have to be disposed of by the prize court, but which do not concern the officer's duty of the place and hour. The directions in this manual, which for practical purposes were sufficient in the case of wars such as have been waged by Great Britain in the past, are quite inapplicable to the case which has now arisen of war with an inland state, whose only communication with the sea is over a few miles of railway to a neutral port. In a portion of the introduction the author discusses the question of destination of the cargo, as distinguished from destination of the vessel, in a manner by no means favourable to the contention advanced in Count Hatzfeldt's note. Moreover, Professor Holland, who edited a revised edition of this

manual in 1888, in a recent letter published in the Times, has expressed an opinion altogether inconsistent with the view which the German Government endeavour to found upon the words of the manual.

In the opinion of Her Majesty's Government, the passage cited from the Manual, "that the destination of the vessel is conclusive as to the destination of the goods on board," has no application to such circumstances as have now arisen.

It can not apply to contraband of war on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country. (Ibid. p. 18.)

The British Admiralty Manual of Naval Prize Law, 1888, stated:

71. The ostensible destination of the vessel is sometimes a neutral port, while she is in reality intended, after touching and even landing and colorably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be "continuous" and the destination is held to be hostile throughout.

Paragraph 73 of this manual provided as to the cargo that if the destination of the vessel on board of which the cargo was should be neutral, then the "destination of the goods should be considered neutral," even if the goods have apparently an ulterior hostile destination.

*Report in 1905.*—In the Report of the British Royal Commission on Supply of Food and Raw Material in the Time of War, 1905, the doctrine of continuous voyage is stated as follows:

Goods, moreover, whatever may be their intrinsic character, are not contraband unless they have a belligerent destination, but there has been during the last half century much discussion as to the evidence necessary to establish the fact that goods are intended for the enemy's use. If the destination of the ship carrying the goods is an enemy's port, this is held to be conclusive evidence as against absolutely contraband goods, but to exonerate the goods it is not sufficient to show that the ostensible destination of the ship is a neutral port. If after touching and even landing and colorably delivering her cargo at such a port, she is in reality intended to proceed with the same cargo to an enemy's port, the voyage is held to be "continuous" and the destination to be

hostile throughout. Moreover, even when the destination of the ship is *bona fide*, a neutral port, it does not follow that she is not engaged in the carriage of contraband, should it appear that the goods in question have an ulterior destination, to be attained by transshipment, over land conveyance or otherwise, for the use of the enemy. In case of goods *ancipitis usus* the requirements as to destination are stricter, and to render such articles confiscable by a belligerent, it is necessary to show that they are intended to reach a port of naval or military equipment belonging to the enemy, or occupied by the enemy's naval or military forces, for the enemy's fleet at sea, or for the relief of a port besieged by such belligerent." (Vol. 1, p. 23, sec. 97.)

*International Naval Conference, 1908–1909.*—In the invitation to the international naval conference which drew up the Declaration of London in 1908–9, Sir Edward Grey suggested as one of the questions for the conference "The doctrine of continuous voyage in respect both of contraband and of blockade."

In the letter of Sir Edward Grey, December 1, 1908, naming the delegates to the International naval conference, he said of continuous voyage:

25. The principle underlying the doctrine of continuous voyage is not of recent origin, and may be regarded as a recognized part of the law of nations. Its application to vessels carrying contraband has already been incidentally explained in paragraph 15 of the present instructions, as justifying the seizure of any neutral ship carrying a contraband cargo which is in fact destined for enemy territory, whether the cargo was to be carried to such territory by the ship herself, or after transshipment, by another vessel, or by overland transport from a neutral port.

26. For the purposes of blockade, on the other hand, the destination justifying capture is that of the ship, and not of the cargo; and a vessel whose final destination is a neutral port can not, unless she endeavours, before reaching that destination, to enter a blockaded port, be condemned for breach of blockade, although her cargo may be ear-marked to proceed in some other way to the blockaded coast. His Majesty's Government believe that all the powers will probably be in agreement on this point, unless the United States were to maintain that the condemnation pronounced by their Supreme Court in the well-known case of the *Springbok* extended the application of the doctrine of continuous voyage to breaches of blockade, and rendered the vessel carrying a cargo destined for a blockaded port liable to seizure, even

though she herself was not proceeding to such port. It is, however, exceedingly doubtful whether the decision of the Supreme Court was in reality meant to cover a case of blockade-running in which no question of contraband arose. Certainly, if such was the intention, the decision would *pro tanto* be in conflict with the practice of the British courts. His Majesty's Government see no reason for departing from that practice, and you should endeavour to obtain general recognition of its correctness. (Parliamentary Papers, Misc. No. 4, 1909, p. 27.)

The question of regulation of continuous voyage gave rise to divergent views, as is evident in the report of the British Delegation to Sir Edward Grey on March 1, 1909, in which the delegation says of continuous voyage:

As the powers by whose prize court the doctrine has always been upheld and applied were naturally reluctant to renounce a right which they claimed to be founded in logic and justice and as, on the other hand, its abandonment was made a vital issue by those who refused to acknowledge it, there seemed at one time to be a danger of the complete breakdown of the conference at this point. (International Naval Conference, Misc. No. 4, 1909, p. 96.)

Agreement among the 10 leading maritime powers that signed the Declaration of London was embodied in article 30, as follows:

Absolute contraband is liable to capture if it is shown to be destined to the territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land.

Of this article the general report of the naval conference says:

The articles included in the list in article 22 are absolute contraband when they are destined for a territory of the enemy or for a territory occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a similar final destination can be shown by the captor. It is not, therefore, the destination of the vessel which is decisive, it is the destination of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that the goods are to be forwarded from there by land or sea to an enemy country, that

is sufficient to justify the capture and subsequent condemnation of the cargo. It is the very principle of continuous voyage, which as regards absolute contraband is thus established by article 30. (1909 Naval War College, International Law Topics, p. 75.)

Continuous voyage as related to conditional contraband was provided for in article 35:

Conditional contraband is not liable to capture, except when on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged at an intervening neutral port.

The ship's papers are conclusive proof of the voyage of the vessel as also of the port of discharge of the goods, unless the vessel is encountered having manifestly deviated from the route which she ought to follow according to the ship's papers and being unable to justify by sufficient reason such deviation. (Ibid. p. 85.)

On this the general report says:

As has been said above, the doctrine of continuous voyage is excluded for conditional contraband. This then is liable to capture only if it is to be discharged in an enemy port. As soon as the goods are documented to be discharged in a neutral port they can not be contraband, and there is no examination as to whether they are to be forwarded to the enemy by sea or land from that neutral port. This is the essential difference from absolute contraband. (Ibid. p. 85.)

*Parliamentary discussion.*—Even though the Declaration of London was not ratified by Parliament, the doctrine of continuous voyage did receive some considerations, as is seen in the remarks of Mr. McKinnon Wood on June 28, 1911:

I come now to the doctrine of continuous voyage upon which we have been attacked. * * * The result of the agreement is very satisfactory. The doctrine is established where it is important and given up where it is of no practical value. It is agreed in the case of absolute contraband that it is very important to us. * * * It is said that we give an advantage to foreign nations who can bring things in by land. Never was there a more ridiculous argument. It is an advantage you can not deprive them of. (Hansard, Commons, v. 27, p. 454.)

*Regulations in 1914.*—While the Declaration of London had not been ratified in 1914, the rules of this Declaration

had prior to 1914 been embodied in the regulations of many States. Articles 30 and 35, relating to absolute and conditional contraband, often appeared without change.

Article 32 of the French instructions of 1912 was issued in conformity with article 30 of the Declaration of London.

"Les articles énumérés ci-dessus sont de contrebande, s'il vous apparait qu'ils sont destinés au territoire de l'ennemi ou à un territoire occupé par lui ou à ses forces armées. Peu importe que le navire transporteur soit lui-meme à destination d'un port neutre." (1925 Naval War College, International Law Documents, p. 149.)

Article 35 of the German ordinance of September 20, 1909, followed the same principle.

Articles of conditional contraband are subject to seizure only on board a ship which is on the way to the enemy country or a place held by the enemy or to the enemy forces, and when these articles are not to be discharged in an intermediate neutral port, i. e., a port at which the ship must call before reaching any final destination. (Ibid. p. 157.)

No Japanese rules had embodied much of the Declaration of London.

After the outbreak of war an effort was for a time made to conform to the articles of the Declaration of London, but soon changes were introduced in general, restricting neutral freedom of commerce.

*Declaration of London and World War.*—On August 6, 1914, Mr. Bryan, Secretary of State of the United States, sent communications, similar to the following, to the embassies at St. Petersburg, Paris, Berlin, and Vienna, and to the legation at Brussels:

DEPARTMENT OF STATE,
*Washington, August 6, 1914—1 p. m.*

Mr. Bryan instructs Mr. Page to inquire whether the British Government is willing to agree that the laws of naval warfare as laid down by the Declaration of London of 1909 shall be applicable to naval warfare during the present conflict in Europe provided that the governments with whom Great Britain is or may be at war also agree to such application. Mr. Bryan further in-

structs Mr. Page to state that the Government of the United States believes that an acceptance of these laws by the belligerents would prevent grave misunderstandings which may arise as to the relations between neutral powers and the belligerents. Mr. Bryan adds that it is earnestly hoped that this inquiry may receive favorable consideration. (Special Supplement, vol. 9, Amer. Jour. Int. Law, p. 1.)

Austria on August 13 and Germany on August 20 replied indicating that their Governments were prepared to apply the Declaration of London "provided its provisions are not disregarded by other belligerents."

Russia, August 20, answered that its actions would be similar to the British.

On August 22 the British Foreign Office informed the American ambassador that the Government—

have pleasure in stating that they have decided to adopt generally the rules of the declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations. A detailed explanation of these additions and modifications is contained in the inclosed memorandum.

The necessary steps to carry the above decision into effect have now been taken by the issue of an order in council, of which I have the honor to inclose copies herein for your excellency's information and for transmission to your Government.

I may add that His Majesty's Government, in deciding to adhere to the rules of the Declaration of London, subject only to the aforesaid modifications and additions, have not waited to learn the intentions of the enemy governments, but have been actuated by a desire to terminate at the earliest moment the condition of uncertainty which has been prejudicing the interests of neutral trade. (Ibid. p. 3.)

This order in council was as follows:

Whereas during the present hostilities the naval forces of His Majesty will cooperate with the French and Russian naval forces; and

Whereas, it is desirable that the naval operations of the allied forces so far as they affect neutral ships and commerce should be conducted on similar principles; and

Whereas the Governments of France and Russia have informed His Majesty's Government that during the present hostilities it

is their intention to act in accordance with the provisions of the convention known as the Declaration of London, signed on the 26th day of February, 1909, so far as may be practicable:

Now, therefore, His Majesty, by and with the advice of his privy council, is pleased to order, and it is hereby ordered, that during the present hostilities the convention known as the Declaration of London shall, subject to the following additions and modifications, be adopted and put in force by His Majesty's Government as if the same had been ratified by His Majesty.

The additions and modifications are as follows:

(1) The lists of absolute and conditional contraband contained in the proclamation dated August 4, 1914, shall be substituted for the lists contained in articles 22 and 24 of the said declaration.

(2) A neutral vessel which succeeded in carrying contraband to the enemy with false papers may be detained for having carried such contraband if she is encountered before she has completed her return voyage.

(3) The destination referred to in article 33 may be inferred from any sufficient evidence, and (in addition to the presumption laid down in article 34) shall be presumed to exist if the goods are consigned to or for an agent of the enemy state or to or for a merchant or other person under the control of the authorities of the enemy state.

(4) The existence of a blockade shall be presumed to be known—

(*a*) To all ships which sailed from or touched at an enemy port a sufficient time after the notification of the blockade to the local authorities to have enabled the enemy Government to make known the existence of the blockade;

(*b*) To all ships which sailed from or touched at a British or allied port after the publication of the blockade.

(5) Notwithstanding the provisions of article 35 of the said declaration, conditional contraband, if shown to have the destination referred to in article 32, is liable to capture, to whatever port the vessel is bound and at whatever port the cargo is to be discharged.

(6) The general report of the drafting committee on the said declaration presented to the naval conference and adopted by the conference at the eleventh plenary meeting on February 25, 1909, shall be considered by all prize courts as an authoritative statement of the meaning and intention of the said declaration, and such courts shall construe and interpret the provisions of the said declaration by the light of the commentary given therein.

And the lords commissioners of His Majesty's Treasury, the lords commissioners of the Admiralty, and each of His Majesty's principal secretaries of state, the president of the probate, divorce, and admiralty division of the high court of justice, all other judges of His Majesty's prize courts, and all governors, officers, and authorities whom it may concern are to give the necessary directions herein as to them may respectively appertain.

ALMERIC FITZROY.

(Ibid. p. 4.)

The United States replied:

DEPARTMENT OF STATE,
*Washington, October 22, 1914—4 p. m.*

Your No. 864, October 19, Declaration of London.

Inasmuch as the British Government consider that the conditions of the present European conflict made it impossible for them to accept without modification the Declaration of London, you are requested to inform His Majesty's Government that in the circumstances the Government of the United States feels obliged to withdraw its suggestion that the Declaration of London be adopted as a temporary code of naval warfare to be observed by belligerents and neutrals during the present war; that therefore this Government will insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States, irrespective of the provisions of the Declaration of London; and that this Government reserves to itself the right to enter a protest or demand in each case in which those rights and duties so defined are violated or their free exercise interfered with by the authorities of His Britannic Majesty's Government.

LANSING.

(Ibid. p. 7.)

This reply was in accord with article 65 of the Declaration of London, which stated—

The provisions of the present declaration form an indivisible whole.

The general report says:

This article is of great importance, and is in conformity with that which was adopted in the Declaration of Paris.

The rules contained in the present declaration related to matters of great importance and great diversity. They have not all been accepted with the same degree of eagerness by all the delegations; some concessions have been made on one point in con-

sideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory. A legitimate expectation would be defeated if one power might make reservations on a rule to which another power attached particular importance. (1909 Naval War College, International Law Topics, p. 155.)

*Restraints on commerce.*—A British order in council of October 29, 1914, introduced still further modifications in the provisions of the Declaration of London and other modifications followed.

These and other acts led the Secretary of State of the United States in a note of December 26, 1914, to say:

DEPARTMENT OF STATE,
*Washington, December 26, 1914.*

To Ambassador W. H. PAGE:

* * * * * * *

The Government of the United States has viewed with growing concern the large number of vessels laden with American goods destined to neutral ports in Europe, which have been seized on the high seas, taken into British ports and detained sometimes for weeks by the British authorities. During the early days of the war this Government assumed that the policy adopted by the British Government was due to the unexpected outbreak of hostilities and the necessity of immediate action to prevent contraband from reaching the enemy. For this reason it was not disposed to judge this policy harshly or protest it vigorously, although it was manifestly very injurious to American trade with the neutral countries of Europe. This Government, relying confidently upon the high regard which Great Britain has so often exhibited in the past for the rights of other nations, confidently awaited amendment of a course of action which denied to neutral commerce the freedom to which it was entitled by the law of nations. * * *

Articles listed as absolute contraband, shipped from the United States and consigned to neutral countries, have been seized and detained on the ground that the countries to which they were destined have not prohibited the exportation of such articles. * * *

In the case of conditional contraband the policy of Great Britain appears to this Government to be equally unjustified by the established rules of international conduct. As evidence of this, attention is directed to the fact that a number of the American cargoes which have been seized consist of foodstuffs and other articles of common use in all countries, which are admittedly

relative contraband. In spite of the presumption of innocent use because destined to neutral territory, the British authorities made these seizures and detentions without, so far as we are informed, being in possession of facts which warranted a reasonable belief that the shipments had in reality a belligerent destination, as that term is used in international law. Mere suspicion is not evidence and doubts should be resolved in favor of neutral commerce, not against it. The effect upon trade in these articles between neutral nations resulting from interrupted voyages and detained cargoes is not entirely cured by reimbursement of the owners for the damages which they have suffered, after investigation has failed to establish an enemy destination. The injury is to American commerce with neutral countries as a whole through the hazard of the enterprise and the repeated diversion of goods from established markets.

It also appears that cargoes of this character have been seized by the British authorities because of a belief that, though not originally so intended by the shippers, they will ultimately reach the territory of the enemies of Great Britain. Yet this belief is frequently reduced to a mere fear in view of the embargoes which have been decreed by the neutral countries, to which they are destined, on the articles composing the cargoes.

That a consignment "to order" of articles listed as conditional contraband and shipped to a neutral port raises a legal presumption of enemy destination appears to be directly contrary to the doctrines previously held by Great Britain and thus stated by Lord Salisbury during the South African War:

"Foodstuffs, though having a hostile destination, can be considered as contraband of war only if they are for the enemy's forces; it is not sufficient that they are capable of being so used, it must be shown that this was in fact their destination at the time of their seizure."

With this statement as to conditional contraband the views of this Government are in entire accord, and upon this historic doctrine, consistently maintained by Great Britain when a belligerent as well as a neutral, American shippers were entitled to rely. * * *

(Special Supplement, vol. 9, Amer. Jour. Int. Law, pp. 55–8.)

A preliminary reply to this note was made by the British Foreign Office, January 7, 1915. Only brief extracts will be made from these notes, in their relation to continuous voyage. In its reply the Foreign Office said:

We are confronted with the growing danger that neutral countries contiguous to the enemy will become on a scale hitherto un-

precedented a base of supplies for the armed forces of our enemies and for materials for manufacturing armament. The trade figures of imports show how strong this tendency is, but we have no complaint to make of the attitude of the governments of those countries, which so far as we are aware have not departed from proper rules of neutrality. We endeavor in the interest of our own national safety to prevent this danger by intercepting goods really destined for the enemy without interfering with those which are "bona fide" neutral. (Ibid. p. 64.)

The British note of February 10, 1915, was a fuller attempt to meet the American objections to British practices. In this note it was said, among other things:

No country has maintained more stoutly than Great Britain in modern times the principle that a belligerent should abstain from interference with the foodstuffs intended for the civil population. The circumstances of the present struggle are causing His Majesty's Government some anxiety as to whether the existing rules with regard to conditional contraband, framed as they were with the object of protecting so far as possible the supplies which were intended for the civil population, are effective for the purpose, or suitable to the conditions present. (Ibid. p. 79.)

*Official consignees.*—On February 20, 1915, the United States proposed as a modus vivendi to the belligerent governments that the United States should designate agencies which would be consignees of foodstuffs in Germany and that these agencies should distribute to noncombatants only and that under these conditions Great Britain would not place foodstuffs on the absolute contraband list. Germany indicated its readiness to accede to this proposition on March 1, 1915, saying, "Such regulation would, of course, be confined to importations by sea, but that would, on the other hand, include indirect importations by way of neutral ports." Great Britain maintained that it could not accept these propositions, March 15, 1915.

*Retaliatory measures.*—Retaliatory measures began to be aimed not merely at belligerents but at neutrals in order to weaken belligerents, and neutral rights, for which there had been many years of struggle, were, from the American viewpoint, disregarded.

In the note of March 30, 1915, the American Secretary of State said:

It is confidently assumed that His Majesty's Government will not deny that it is a rule sanctioned by general practice that, even though a blockade should exist and the doctrine of contraband as to unblockaded territory be rigidly enforced, innocent shipments may be freely transported to and from the United States through neutral countries to belligerent territory without being subject to the penalties of contraband traffic or breach of blockade, much less to detention, requisition, or confiscation." * * *

The note of His Majesty's principal Secretary of State for Foreign Affairs, which accompanies the order in council and which bears the same date, notifies the Government of the United States of the establishment of a blockade which is, if defined by the terms of the order in council, to include all the coasts and ports of Germany and every port of possible access to enemy territory. But the novel and quite unprecedented feature of that blockade, if we are to assume it to be properly so defined, is that it embraces many neutral ports and coasts, bars access to them, and subjects all neutral ships seeking to approach them to the same suspicion that would attach to them were they bound for the ports of the enemies of Great Britain, and to unusual risks and penalties. (Ibid. p. 117.)

*British blockade in World War.*—The report of the British war cabinet for the year 1917 speaking of interference with neutral trade by what was called blockade said:

Turning to blockade, by the end of 1916 the system of the blockade had reached a high point of elaboration. It was based upon—

(*a*) Vigilant scrutiny of the transactions of all suspect neutral traders and the listing of all who habitually assisted enemy trade.

(*b*) Rationing schedules showing the normal requirements of all the European neutrals in respect of all the more important commodities which they obtain from overseas.

(*c*) Agreements with neutral shipowners, traders and associations of traders under which the contracting neutrals gave certain undertakings in consideration for special facilities for their shipments. Many of these agreements contain rationing clauses which make it possible for His Majesty's Governments to detain automatically any excessive shipments of the articles in question.

Broadly speaking, it may be said that by December, 1916, all, or almost all, the oversea trade of Germany had been stopped.

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There was still a little leakage in respect of the trade from the Dutch colonies, which, when we were not in so strong a belligerent position, we had to deal with specially, but it only affected a few articles like tobacco, cinchona, and, even so, the amounts were relatively small. We could, in fact, claim that the German attempt to interpose the border countries for the purpose of pursuing the great overseas trade which they had previously carried on from German ports was definitely defeated.

Beyond this the main preoccupation of the Ministry of Blockade has been directed to diminishing the trade between the border neutrals and Germany. It was impossible to get at this trade directly, for obvious reasons, nor had we any belligerent right which we could enforce in the prize court to stop the import into a neutral country of goods which might be used to produce other goods which were to be sent into Germany. All we could do was, firstly, to use such means of economic pressure as we had to induce the neutrals to forego their German trade, and, secondly, to buy, as far as we could, surplus products which otherwise would have gone to Germany. (The War Cabinet, Report for the Year 1917, p. 22.)

*Discussion in British House of Commons.*—In the British House of Commons in January, 1916, the matter of further interference with commerce was discussed. On January 26, 1916, the following were among the statements made:

Mr. SHIRLEY BENN. I beg to move—

"That this House, having noted the volume of the imports into neutral countries bordering on enemy territory of goods essential to the enemy for the prosecution of the war, urges the Government to enforce as effective a blockade as possible, without interfering with the normal requirements of those neutral countries for internal consumption." (Parliamentary Debates, Commons, 1916, 5th series, LXXVIII, 1279.)

In proposing this motion Mr. Benn stated he did not wish to embarrass the Government, but called attention to the increase of imports to neutral countries near Germany with the implication that an "emphatic enforcement of the law of continuous voyage and the doctrine of ultimate destination" would have cut off many of these imports. He suggested a blockade from the Norwegian shore across the Straits of Gibraltar and that

everything going into or coming out of Germany be declared contraband. He admits that neutral countries "would very probably object," but maintains that America in the Civil War and in the Spanish-American War had made extreme claims.

Mr. Leslie Scott, continuing the debate, said:

We have heard a good deal of talk, conveyed to us from the press in other countries, of the rights of neutrals. I think the rights of belligerents are a little lost sight of by neutrals. The business of His Majesty's Government is to consider rather the rights of belligerents than the rights of neutrals. We have to take risks, but in measuring the risks it is worth while remembering what the true character of the risks are that we are running in relation to neutrals. I am satisfied that the Government are satisfied that there is no risk of any one of those neutral powers which are concerned going to war with us. Upon that basis, which I assume, and I believe everyone in this House believes to be the right basis—upon that footing the only risks we run in regard to neutrals are the risks of causing pecuniary damage to their commercial interests. I never knew a commercial grievance which was not adequately compensated by a money payment. (Ibid. p. 1286.)

After further discussion he says:

Fourthly, and this is the crux of the situation, goods in excess of neutral requirements should be presumed to be intended for the enemy. (Ibid. p. 1293.)

Mr. Scott advocated a comprehensive blockade.

Our command of the sea is absolute. It is in the power of the Allies to stop every ship carrying goods, directly or indirectly, coming from or destined to an enemy country. We can stop them in the Atlantic, we can stop them in the North Sea, we can stop them in the Mediterranean, and we can stop them in the Indian Ocean, the Black Sea, and the Persian Gulf. We can stop them all round the enemy powers, and we ought to do it. Under existing conditions no neutral can dispute our ability in fact to prevent the ingress and egress of German trade. That cardinal necessity of the validity of blockade can not be disputed. We are in a position to do it. The effective force is there. We can apply it this minute without fear of effective resistance and with a certainty of danger attaching to every ship that tries to break our blockade. Under these circumstances the major premise is estab-

lished for the suggestions that I make. I conceive that the object of this motion is that this House should tell the Government and the world in no uncertain terms that we mean the command of the sea to be utilised to the full; that no more exceptions shall be made in individual cases; and that the blockade shall be applied rigorously to-day and in future, continuously and without intermission, until Germany admits defeat. (Ibid. p. 1294.)

Other members took views at variance with these expressed, but there was general agreement that some of the orders in council aimed to check trade with the Central Powers had failed.

Mr. Leverton Harris, who had been associated with the enforcement of so-called blockade, speaking of exports from neutrals to belligerents in the early days of the World War, said:

Those neutrals, having got rid of their own commodities, at once find a difficulty in providing for their own population, and consequently you find a very large increase of the imports into those neutral countries, which increase appears in the figures. That is one of the most difficult questions with which the Government have to deal. Here is a perfectly legitimate trade. Nobody can say to a neutral country, "You are not to sell your butter to Germany." We can not say to Denmark, "You are not to sell your butter to Germany." We buy butter ourselves very largely from Denmark, and Denmark is perfectly entitled to sell her butter. I do not know upon what principle of international law you can say to Denmark that she is not to buy nuts or other articles from foreign countries to produce margarine unless it was for consumption by her own people. That is the greatest difficulty which I think the problem presents at the present moment. (Ibid. p. 1305.)

Speaking in reply to various questions, the British Undersecretary of State for Foreign Affairs, Lord Robert Cecil, on March 9, 1916, said:

Why not apply the doctrine of continuous voyage? We have applied it and worked it, and it is the very foundation of the whole of the action which we have taken. You can not blockade an enemy through a neutral country except by the operation of that doctrine. Our plan is to arrest all commerce of Germany, whether going in or coming out, whether it comes through a

neutral port or a German port; that is the whole object and the whole difficulty of our position. We have to discover for certain what is German and what is neutral commerce. I can not understand what more you can do by blockade. (Ibid. LXXX, 1815.)

*The rationing system.*—Mr. J. A. Salter, who had been closely related to the administration of the British and allied measures to control movements of vessels and goods toward the Central Powers in the World War, writing in 1920 said:

Germany's declaration, however, that after February, 1915, she would instruct her submarines to attack all merchant vessels in British waters, created an outburst of indignation in neutral countries, which Great Britain at once used to make the blockade comprehensive. In the reprisals order of March 11, 1915, she announced her intention to stop all goods of enemy origin or destination, and proceeded henceforth to stop supplies intended for Germany, without regard to the distinction of the earlier contraband rules or to the fact that the supplies might be consigned through a neutral port. Even this, however, was not enough. It was useless to prohibit every cargo of food destined for Germany, whether sent through contiguous neutral countries or not, if these neutral countries could themselves import freely for their own uses, and with the sufficiency so obtained, export their own produce to Germany by routes which the Allies could not control. This was the reason for the "rationing" policy, which was begun in 1915, and subsequently became the central feature in the whole blockade system. Detailed statistics were compiled as to the pre-war imports and consumption of all the neutral countries which had uncontrolled access to Germany; and only enough war imports were allowed to give a bare sufficiency for internal consumption. The neutral countries were therefore compelled to adopt internal rationing measures, so that the system of official control extended over almost the whole world—neutral and belligerent alike. The actual privations of some of the neutrals were indeed much more serious than those in allied countries, no doubt partly because their export prohibitions were not sufficient to prevent supplies slipping across the border under the attraction of very high profits. (Allied Shipping Control, J. H. Salter, p. 100.)

*Extension of doctrine, 1914–1918.*—In the case of the *Kim*, the British prize court in 1915, relying upon early

cases, referred to the case of the *Bermuda* in which Chief Justice Chase said:

> Neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port. (3 Wall. [1865], 514.)

In the decision in the case of the *Kim*, Sir Samuel Evans said:

> As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country. (*The Kim* L. R. [1915], p. 215.)

He also said:

> It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. * * *
>
> And with the facilities of transportation by sea and by land which now exist, the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port, at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached. (Ibid.)

In this case the decision was upon the goods themselves, and states:

> For the many reasons which I have given in the course of this judgment and which do not require recapitulation or even summary, I have come to the clear conclusion from the facts proved and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption or bona fide sale or otherwise; but, on the contrary, that they were on their way not only to German territory but also to

the German Government and their forces for naval and military use as their real ultimate destination.

To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities and to be blinded to the realities of the case. (Ibid.)

The *Balto* had in its cargo when on a voyage from American to Swedish ports in 1915 leather. The ship was "diverted to Kirkwall for examination." The British Government contended—

that leather on its way to a neutral country, there to be made into boots and then to be taken to an enemy country, is liable to condemnation as contraband;

while for the owners it was maintained that—

The doctrine of continuous voyage applies only to goods which in their actual state at the time of capture are on the way to the enemy. Where the destination is a neutral port, the subsequent transportation after manufacture is permitted. There must be a preconceived plan or scheme to send the goods to a hostile destination, and that plan must be in operation when the goods are siezed. There is absolutely no proof of any such intention in this case. Even if there was such an intention, the right of the belligerent is not to seize the leather on its way to the factory, but to stop the boots on the way from Sweden to Germany. (L. R. [1917], p. 79.)

The president of the prize court said:

One of the tests applied was whether the goods imported were intended to become part of the common stock of the neutral country into which they were first brought. In my view the notion that leather, imported into a neutral country for the express purpose of being at once turned into boots for the enemy forces, becomes incorporated in the common stock of the neutral country is illusory. Instances can be given and multiplied which appear to reduce to an absurdity the argument that if work is done in the neutral country upon goods which are intended ultimately for the enemy, that circumstance of necessity puts an end to their contraband character, and prevents their being confiscable according to the doctrine of continuous voyage.

It may be well to give a few instances, by way of illustration, relating both to conditional and absolute contraband.

Suppose coffee beans and cocoa beans were imported into a neutral country with the object of their being converted into

coffee or cocoa to be sent on to the enemy, would the fact that the coffee beans were ground into coffee, or the cocoa beans were ground and mixed with sugar to make cocoa in the neutral country, be enough to render those goods immune from capture if they would be capturable as coffee or cocoa foodstuffs when afloat? Again, assume that cloth of an inappropriate hue, but intended for the enemy forces, was imported into a neutral country, and there dyed into the desired colour for the enemy forces; or that steel helmets were so imported, and there painted with the Germany colour, or fitted with the regulation German army or regimental marks, would a belligerent lose the right to seize them at sea when and because they were not so dyed, painted, or fitted? To take a couple more instances. It is quite possible that the metal parts of rifles for the enemy army might be imported into a Scandinavian country in a complete state; and that the butt ends or timber parts were intended to be affixed in such country because timber was plentiful there, or for some other reason good or ostensible. Would the metal rifles be free from capture by a belligerent because they were to be so completed in the neutral country before being sent on to the enemy? If a field gun was imported, would it be protected from seizure because it would, in fact, be mounted upon its appropriate carriage before being exported from a neutral country to the enemy's front?

The court could not give affirmative answers to such questions as these unless it cut itself adrift from the safe anchor of common sense. (Ibid.)

The decision in the case of the *Bonna* in 1918 governed a number of other cases. The *Bonna*, a neutral vessel, was seized on its way from the Dutch East Indies to Scandinavian ports and had on board coconut oil which was used in Sweden in the manufacture of margarine. The case was presented as follows:

Mr. Leslie Scott, K. C., M. P., for the claimants: Apart from the contention based on the export of butter, there is no case to answer. There is no authority that supports this contention. The case nearest in point is the *Balto*, in which it was held that leather destined to be made into boots for the Germay Army could be stopped on its way to a Swedish boot factory. That is a very different case. There is no support in international law for the proposition that materials used in manufacture are confiscable when the products of the manufacture are to be consumed in the country into which they are imported, because their consumption will enable other people to export a totally different

product to the enemy country. The proposition is a totally unjustifiable extension of the doctrine of continuous voyage.

Mr. J. G. Pease, replying for the Crown: The butter is released when the materials for making margarine are brought into Sweden and the margarine is manufactured. That is enough to make the goods conditional contraband. The principle established by the cases is that if goods of the same kind are going to the enemy country it is not necessary to identify the particular goods. If the goods are of the same species and can be used for the same purpose, the doctrine of continuous voyage should apply. The articles are practically the same. Instead of being classified as "margarine" and "butter" they can all be classed as goods of the same kind, viz, "edible fats." This may be carrying the principle of conditional contraband further than hitherto, but in view of the ramifications of modern commerce it is not going too far. (7 Lloyds Prize Cases, 367; L. R. [1918], p. 123.)

In the judgment on this case the president of the prize court, Sir Samuel Evans, said:

I do not consider that it would be in accordance with international law to hold that raw materials on their way to citizens of a neutral country, to be converted into a manufactured article for consumption in that country, were subject to condemnation on the ground that the consequence might, or even would necessarily, be that another article of a like kind and adapted for a like use would be exported by other citizens of the neutral country to the enemy. (Ibid.)

In the case of the *Bonna* the doctrine of continuous voyage by substitution was not supported. No authorities sustain such a position. The debates in the House of Commons, even when the strain of war was extreme, show little approval of such a doctrine. The practical application of such a policy would put an end to ordinary neutral trade and would tend to make war general.

*Liability on account of substitution.*—There were many propositions for restricting the exports from neutral to belligerent States during the World War. The theory of restricting or prohibiting trade with neutrals in articles which themselves might not go to a belligerent but which might release others which might go to a belligerent was advanced and received some approval. That a belliger-

ent might decline to export certain goods to a neutral unless the neutral agreed not to export certain goods to the other belligerent was regarded as a lawful restraint. The Minister of Blockade said on March 27, 1917, of the British relations to Norway:

> The position is this. Norway wants a great deal of copper of a particular refined kind for her electric works which she is establishing in all parts of the country. She has got copper in her own country, but it is in the form of pyrites, and contains a small quantity of copper in a large amount of sulphur ore. We have made an arrangement by which, in return for our providing electrolytic copper—refined copper—Norway will restrict her trade to Germany, and indeed to us, within certain limits. That is the nature of the bargain we made. It has been of great use to us, and I believe it has been of great use to Norway. That is the kind of negotiation which, as it seems to me, is the only way in which you can deal with the situation. (Parliamentary Debates, Commons, 92 H. C. Deb. 5 s. 260.)

Such a negotiation as mentioned above was unlike in principle to the theory of substitution though discussed in the same speech, where it was said:

> I come to agricultural produce. Simple agricultural produce is different. My honorable friend (Mr. Peto) stated that in a very plausible way. He said, after all, you let maize come in. It goes to feed the pig, and the pig goes on to Germany. I have heard people put it in a popular way that the pig is merely maize on four legs. After all, when you arrest a cargo of maize you have to show to your prize court that it has an ultimate destination—Germany. What you can show is that it is going to feed pigs, part of which will be eaten in Holland or wherever it may be, part of which will be reexported to this country, and part of which will go, it may be, to Germany. It is very difficult indeed to say that any particular part of that cargo of maize has the ultimate destination of Germany, even if you disregard the fact that it is intermediately being changed into pig. I can only go on what I am advised I can do. That is one difficulty. * * *
>
> The question is whether we are entitled and how far we are able to stop maize or oil cake which is coming from a neutral country—the United States—and going to a neutral country and passing through our patrols upon the doctrine which I have tried to describe to the House. In the present condition of affairs I do not want to prejudge anything, but I rather doubt whether

we could succeed in a prize court if we put forward such a doctrine as that. My honorable and gallant friend (Commander Bellairs) recognises the difficulty we are in, but says the time has come to put aside the prize court altogether. We are to proceed upon what he regards as a new European law. He told us in his notice that we are not to allow any supplies to neutral European countries unless there is an entire cessation of their trade with Germany. That would mean, I suppose, that we are to arrest all the cargoes of feeding stuffs, and fertilisers unless neutral countries will undertake that they will not export any agricultural produce to Germany at all—of course, from a neutral country. I have some doubt whether that could be easily defended. I should have some little hesitation in repeating the perorations in which we have indulged about the defence of the rights of small countries. * * *

We have to consider—and I speak in very general terms here—the geographical and military position in these countries. Any honorable member can, if he chooses, by consulting an ordinary textbook, see what was the military power of Denmark, both on sea and land, before the war. I do not know what she may have done to improve that position since then. If he will try to consider what his position would be as a Danish statesman, faced with a demand of the British Government that Denmark should wholly cut off trade with Germany, I think he would begin to count up rather anxiously the number of soldiers and ships at his command. He would have to consider also the relation between Denmark and the other Scandinavian countries. He would have to consider the general effect of any action against her on other neutral nations. He would have to consider the effect of any such policy as that which my honorable and gallant friend recommends on the general war aims with which this country entered the war. We have above all to remember this, that we can not lay down this principle—and to do my honorable and gallant friend justice he does not lay it down—as applied to Denmark only. You have to consider what would be the effect of attempting to apply such a rule as that to all neutrals alike. (Ibid. 260–263.)

Later in the same debate, Sir Edward Carson, first lord of the Admiralty, said:

The policy of the country, whatever it may be, must be the policy not merely of the Foreign Office or of the Navy, but it must be the policy of the cabinet, and the cabinet having laid down the policy, the Foreign Office by negotiation, and the Navy by action, have tried to see that policy carried out. Somebody comes

and says, "Leave it to the Navy. The blockade will be all right, and nothing will go into Germany." Those who think that do not really see what that means. What they really mean by that is that the Navy will go just as they please, seize every ship of every neutral, bring it into port, and take the goods out of it that were intended for neutral countries, and all will be well. That is really what they imagine. They never imagine for a moment that we are dealing not with one neutral, but with two neutrals—the neutral who is exporting and the neutral who is importing. I would like to know where we would be if this kind of duty had been put upon the Admiralty, that we were simply to get an instruction that nothing was to go to Germany through a neutral country that was imported from another neutral country. The truth of the matter is that those who put forth that absurd doctrine mean that we should go to war with everybody. That is what it really comes to. * * *

Will any honorable member get up here, for instance, to say in this House "You ought to prevent anything going to Norway which, by any possibility, can go to Germany under any circumstances"? Will anybody get up and say that? What would be the result? Norway would say, "Very well, you shall no longer get from us what is essential for your munitions and other matters of this kind." Will anybody say that this is a course we ought to pursue? No; what the system of blockade that is carried out by my right honorable friend means is this—and we profess nothing more—not that we are able to prevent food and imports entirely from getting into Germany through neutral countries, but that this is the best system for minimizing imports from getting into Germany. My honorable friend who spoke last about the food cry took as an illustration feeding stuffs that go to the fattening of cattle in neutral countries, and suggested that we ought to do something to prevent the produce of those feeding stuffs from ever going into Germany. I do not know where our rights come in to do that. Will he tell me that we have a right to say to America that she is to have no trade with neutral countries? Does he say that? Of course he can not. The only way, leaving international law and international rights out of account, of doing this is by saying that what is really going into Denmark, or Holland, or wherever it may be, is really intended to go into Germany. That is what is called the doctrine of continuous voyage. Was there ever a more absurd theory put forward than that the doctrine of continuous voyage was to be treated in this way? You sent foodstuff into Denmark or Holland; it does not to go into Germany, but is used to feed pigs, and eventually the pigs when fattened may go into Germany, or may be eaten in

Denmark or Holland, and you are to go into court and say that by the doctrine of continuous voyage that food ought not to be allowed to go into the neutral countries, because it is food which is used to feed the pigs which may or may not go to Germany. On the face of that you might starve the Danes, or the Dutch, or other neutrals. How do you know when bread goes into Norway that the Norwegian who feeds upon it may not join the German Army? There is continuous voyage for you! (Ibid. 271–274.)

## CONCLUSION

While the early decisions upon continuous voyage related to vessels engaging in time of war in trade which was not open to them in time of peace, later decisions greatly extended this doctrine. The destination of vessel or the destination of the cargo might make it liable to condemnation. The cargo might go forward by another vessel or by overland transport. In case of the cargo it was maintained that it made no difference as to how many intermediate means of transport or national boundaries might interpose, it was the ultimate destination that determined liability, and the doctrine of ultimate destination came to be accepted. The ultimate destination was viewed as an objective fact, regardless of the intent of the parties concerned. In the case of the *Kim* in 1915 Sir Samuel Evans, president of the British prize court, said:

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage or transportation, both in relation to carriage by sea and to carriage overland, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions and with the view of the great body of modern jurists and also with the practice of nations in recent maritime warfare.

The result is that the court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible and, if so, what the real ultimate destination was.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered

for the purpose of being imported into the common stock of the country. This test was applied over a century ago by Sir William Grant in the Court of Appeals in prize cases in the case of the *William*. It was adopted by the United States Supreme Court in their unanimous judgment in the *Bermuda*, where Chase, C. J., in delivering the judgment, said: "Neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port." (L. R. [1915], p. 215.)

The cargo on board a vessel at the time of seizure was the proper subject for the proceedings of the prize court, but not the goods for which this cargo might be substituted in the neutral country to which the cargo itself was really destined.

SOLUTION

The capture should not be sustained under the doctrine of continuous voyage.

## Situation II

### SUBMARINES

Assuming that the treaty of the Conference on Limitation of Armament, 1921–22, relating to the use of submarines and noxious gases in warfare should not be ratified, what are the privileges of a belligerent submarine?

### CONCLUSION

A belligerent submarine lawfully commissioned as a vessel of war may exercise the rights of a vessel of war, but its nature gives it no special rights or privileges.

### NOTES

*Treaty in relation to the use of submarines and noxious gases in warfare.*[2]—It is assumed in this situation that the treaty in relation to the use of submarines and noxious gases of the Washington Conference on the Limitation of Armament has not been ratified.

By Article II of the above treaty "all other civilized powers" are invited "to express their assent" to Article I, which is declared to be "among the rules adopted by civilized nations." This reaffirmation is apparently to make clearer to "the public opinion of the world the established law." The law as stated in Article I would presumably be binding, even without a treaty, because it is declared to be "an established part of international law."

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[2] A Treaty Proposed at Washington, 1922, in Relation to the Use of Submarines and Noxious Gases in Warfare

The United States of America, the British Empire, France, Italy and Japan, hereinafter referred to as the Signatory Powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, and to pre-

*Queries as to articles.*—Many queries have arisen as to the exact meaning of words and clauses in Article I of the treaty. These questions vary in significance, but deserve attention because any new statement, even of law already "adopted," should be clear to those who may be bound to act in accordance with its provisions. It has been asked whether the use of the word "adopted" in the preamble and in Article I had the same meaning, and

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vent the use in war of noxious gases and chemicals, have determined to conclude a Treaty to this effect, and have appointed as their Plenipotentiaries:

[Names of plenipotentiaries.]

ARTICLE I

The Signatory Powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, the following are to be deemed an established part of international law;

(1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

(2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

ARTICLE II

The Signatory Powers invite all other civilized Powers to express their assent to the foregoing statement of established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents.

ARTICLE III

The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

ARTICLE IV

The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated

it was presumed that the word referred to an act completed, or, as stated, rules "deemed an established part of international law."

The first paragraph speaks of the rules enumerated thereunder as "adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war." The history of the law of visit and search shows that it was primarily concerned with mat-

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in the recent war of 1914–1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.

ARTICLE V

The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto.

ARTICLE VI

The present Treaty shall be ratified as soon as possible in accordance with the constitutional methods of the Signatory Powers and shall take effect on the deposit of all the ratifications, which shall take place at Washington.

The Government of the United States will transmit to all the Signatory Powers a certified copy of the procès-verbal of the deposit of ratifications.

The present Treaty, of which the French and English texts are both authentic, shall remain deposited in the Archives of the Government of the United States, and duly certified copies thereof will be transmitted by that Government to each of the Signatory Powers.

ARTICLE VII

The Government of the United States will further transmit to each of the Non-Signatory Powers a duly certified copy of the present Treaty and invite its adherence thereto.

Any Non-Signatory Power may adhere to the present Treaty by communicating an Instrument of Adherence to the Government of the United States, which will thereupon transmit to each of the Signatory and Adhering Powers a certified copy of each Instrument of Adherence.

In faith whereof, the above named Plenipotentiaries have signed the present Treaty.

Done at the City of Washington, the sixth day of February, one thousand nine hundred and twenty-two.

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ters of property rather than life, and that prior to the World War loss of life was rarely involved except in case of attempt to escape or in case of resistance. If, "(1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized," means, that *after* an "order to submit to visit and search" a vessel may be seized without further action, it can scarcely be maintained that this part of Article I is "an established part of international law." Under accepted law the order is preliminary to the visit and search. By visit and search the grounds for seizure are determined, and visit and search precedes seizure, and seizure without visit and search would be justified in such a case only on the ground of resistance. The Instructions for the Navy of the United States issued in June, 1917, were similar to those of other States, and were as follows:

47. The boarding officer shall first examine the ship's papers in order to ascertain her nationality, ports of departure and destination, character of cargo, and other facts deemed essential. If the papers furnish conclusive evidence of the innocent character of vessel, cargo, and voyage, the vessel shall be released; if they furnish probable cause for capture she shall be seized and sent in for adjudication. (1925 Naval War College, 27.)

There is the further complication in this paragraph of the proposed treaty that the word "seizure," when used in the same article as "capture," would be presumed to be used in the technical sense as the terms are used in naval regulations, though it is not clear that this was intended. Further, the object of visit and search of a vessel is not merely to determine "its character," but also to determine the character of its cargo and personnel and its destination, conduct, etc., as grounds for seizure.

The third paragraph of Article I states:

A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning or to proceed as directed after seizure.

If this paragraph intends to convey in the word "attack" the meaning of "use of force against" in case of

attempt to escape or resistance to visit and search, the statement would be in accord with practice. There would be some doubt as to the meaning of the words "to proceed as directed after seizure." If a merchant vessel is in control of a prize crew there might be some question as to the interpretation of the clause. If, however, the merchant vessel was under escort of a vessel of war the liability would be recognized. It might be possible that after seizure a merchant vessel had been directed to proceed without prize crew or escort to a named port; then under this paragraph some maintain that the vessel would be liable to attack if deviating from the prescribed course.

As the paragraph seems to read, a merchant vessel must not be attacked unless it refuse to submit to visit and search after warning or (refuse) to proceed as directed after seizure, it may be said that this clause "or to proceed as directed after seizure" did not appear in the draft resolutions as originally presented.

It has been claimed that the fourth paragraph greatly extends the liability of merchant vessels to destruction because stating that "A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety" might imply that after placing the crew and passengers in safety, the vessel might lawfully be destroyed, which is not an established part of international law, and some have questioned how this restriction applies in case of refusal to submit to visit and search.

The second part of Article I affirmed that the above are universal rules, and that if a submarine can not capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and to permit the merchant vessel to proceed unmolested. Verbal questions, such as whether the use of the word "desist" was with intention to imply that the attack had already begun have been put forward. In view of the use of the word "seizure," in preceding para-

graphs, and the use of the words "capture" and "seizure" in this part of Article I, there has been uncertainty as to the significance of these words and the order of action implied.

Article II invites the assent of civilized powers to Article I as a "statement of the established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents." This clearly aims to secure the sanction of public opinion for Article I, while Article III aims to secure legal sanction for making a man who may be under orders of his government and liable for disobedience to those orders, also liable to the civil or military authorities of any other power, even the enemy, "as for an act of piracy." This is not necessarily confined to officers of submarines.

Article IV affirms what has been further questioned, "the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants." There are many different points of view as to what are "commerce destroyers" and in regard to other matters.

Some of these and other queries were raised at the Conference on Limitation of Armament and in the course of the subcommittee discussions, as may be seen from the official report.

*Preparation of treaty on submarines.*—The treaty, as stated in the official report, was not referred to technical subcommittees for consideration and hence the discussion of its provisions is found in the reports of the subcommittee on limitation of armament.

The original proposition as to the rules for submarines was made by Mr. Root, of the American delegation, on December 28, 1921. Mr. Root said:

One fact which seemed very clear was that mere agreements between Governments, rules formulated among diplomats in the course of the scientific development of international law, had a very weak effect upon belligerents when violation would seem to aid in the attainment of the great object of victory. This has been clearly demonstrated in the war of 1914–18.

Another fact established by the war was that the opinion of civilized nations had tremendous force and exercised a powerful influence on the condition of belligerents. The history of propaganda during the war had been a history of almost universal appeal to the public opinion of mankind and the result of the war had come largely as a response.

The report further says:

The purpose of the resolutions he was about to read was to put into such simple form the subject which had so stirred the feelings of a great part of the civilized world that the man in the street and the man on the farm could understand it.

The first resolution, Mr. Root said, aimed at stating the existing rules, which, of course, were known to the committee but which the mass of people did not know, in such a form that they would be understood by every one.

Mr. Root then read the following:

"I. The signatory powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, declare that among those rules the following are to be deemed an established part of international law:

"1. A merchant vessel must be ordered to stop for visit and search to determine its character before it can be captured.

"A merchant vessel must not be attacked unless it refused to stop for visit and search after warning.

"A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

"2. Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from capture and to permit the merchant vessel to proceed unmolested."

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This, Mr. Root said, was a distinct pronouncement on the German contention during the war in regard to the conflict between the convenience of destruction and the action of the belligerent under the rules of international law.

Mr. Root then read the following:

"II. The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of such use shall be universally accepted as a part of the law of nations, they declare their assent to such prohibition and invite all other nations to adhere thereto." (Conference on the Limitation of Armament,[3] p. 594.)

*Discussion of treaty.*—When taken up for discussion on December 29, 1921, Mr. Balfour (British) and Admiral de Bon (French) adhered in principle to the propositions of Mr. Root.

Senator Schanzer said that he associated himself entirely with Mr. Balfour's and Admiral de Bon's remarks. The Italian delegation at the preceding meeting gave its full adherence to the aim to which Mr. Root's proposal tended, but they also thought that the question of formulating rules for the use of submarines in war was, above all, a legal question, which ought to be examined by a competent committee of jurists. (Ibid. p. 606.)

Replying to certain questions of Senator Schanzer, Mr. Root said:

First, as to the agreement of Resolution I of the resolutions now before the committee, with the second resolution relative to the prohibition of making use of submarines as commerce destroyers, which Senator Schanzer deemed inconsistent with Resolution I.

Resolution I was a statement of existing law; Resolution II, if adopted, would constitute a change from the existing law and therefore it was impossible to say that it was not inconsistent. If it were not inconsistent, there would be no change. Resolution II could not be consistent with Resolution I and still make a change.

The report continues:

Senator Schanzer had also suggested that the Resolution I be completed by including a definition of "a merchant ship." Throughout all the long history of international law no term had been better understood than the term "a merchant ship."

It could not be made clearer by addition of definitions which would only serve to weaken and confuse it. The merchant ship,

[3] These references are to the full report printed in English and French. Government Printing Office, 1922.

its treatment, its rights, its protection, and its immunities, were at the base of the law of nations. Nothing was more clearly or better understood than the subject called "merchant ship." (Ibid. p. 610.)

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Mr. Root declared he was opposed to the reference of this resolution to a committee of lawyers or to any other committee. He asked for a vote upon it here. If the delegation of any country represented here had any error to point out in it, he was ready to correct it, but he asked for a vote upon it in furtherance of the principle to which every one of his colleagues around the table had given his adherence.

Mr. Root said that, in answering Senator Schanzer's very discriminating question regarding the relations between Resolutions I and II, he had omitted to say that, of course, if the second resolution were adopted by all the world, it would supersede Resolution I. This, however, would be a long, slow process and during the interval the law as it stood must apply until an agreement was reached. Resolution I also explained in authorized form the existing law and could be brought forward when the public asked what changes were proposed. In proposing a change, he said, it was necessary to make clear what the existing law was. It was very important to link this authoritative statement in Resolution I with the new principle proposed in Resolution II. (Ibid. p. 618.)

Mr. Balfour, on the afternoon of December 29, 1921, said of the British Empire delegation—

the members of that delegation would have preferred that the document itself should have been rendered unnecessary by the abolition of submarines. Since they had not been able to carry out this policy, however, Mr. Root's resolution provided them with an alternative. (Ibid. p. 630.)

Mr. Hughes, on the same day, said:

Such a declaration as the one proposed in the first resolution would go to the whole world as an indication that, while the committee could not agree on such limitation, there was no disagreement on the question that submarines should never be used contrary to the principles of law governing war. (Ibid. p. 636.)

*Drafting committee.*—The first resolution, later Article I of the submarine treaty, was referred to a drafting committee of one member from each delegation, Mr. Root

being named from the American delegation; Sir Auckland Geddes, from the British; Admiral de Bon and Mr. Kammerer, from the French; Signor Ricci, from the Italian; Mr. Hanihara, from the Japanese. The other provisions were also referred to the same committee.

Mr. Hughes, speaking of the second resolution, which later became Article IV of the treaty, said:

> This resolution fundamentally recognized, however, the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of neutrals and noncombatants. He assumed the resolution to mean that, while the rules of war were as stated in the first resolution—at least in substance—and while it was the sense of the powers there represented that they should be adhered to and clearly understood, the civilized world would be asked to outlaw the submarine as a weapon against commerce. (Ibid. p. 638 )

*Resolution I.*—Resolution I was presented by the drafting committee on January 5, 1922, as follows:

> I. The signatory powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, declare that among those rules the following are to be deemed an established part of international law:
>
> (1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.
>
> A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning or to proceed as directed after seizure.
>
> A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.
>
> (2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested. (Ibid. p. 686.)

"*Merchant vessel*" *and* "*capture.*"—Senator Schanzer requested the following entries in the minutes of the subcommittee:

It is declared that the meaning of Article II is as follows: Submarines have the same obligation and the same rights as surface craft.

And:

With regard to the third paragraph of Article I it is understood that a distinction is made between the deliberate destruction of a merchant vessel and the destruction which may result from a lawful attack in accordance with the rules of the second paragraph. If a war vessel under the circumstances described in paragraph 2 of Article I lawfully attacks a merchant vessel, it can not be held that a war vessel, before attacking, should put the crew and passengers of the merchant vessel in safety. (Ibid. p. 686.)

Later the report says:

Senator Schanzer stated that the Italian delegation accepted Resolution I, but that, so far as they were concerned, the application of the resolution was subject to the two statements made by him in the subcommittee as entered on the minutes of the first meeting (December 31, 1921) of the subcommittee of five on drafting and as just read by Mr. Root.

Senator Schanzer stated in addition that the Italian delegation understood the term "merchant vessel" in the resolution to refer to unarmed merchant vessels.

Mr. Hanihara said that he wished to suggest that the word "seize" should be substituted for "capture" in the last paragraph.

Mr. Root, replying to Mr. Hanihara, said that the subcommittee understood the word "capture" to describe the whole process, one step of which was seizure and that it was intended to make the term "capture" comprehensive. (Ibid., p. 688.)

Senator Schanzer said he did not deny that under existing rules of international law a merchant vessel might properly carry a limited armament for defensive purposes, but he wished to say that the Italian interpretation of the term "merchant vessel" took into account this limitation. He therefore repeated that the Italian interpretation was in accord with his preceding declaration and with the existing rules of international law. (Ibid. p. 692.)

Mr. Hughes said:

He assumed that all the representatives present accepted the proposition that merchant vessels, as merchant vessels—a category well known—stood where they were under the law, and that this resolution defined the duties of submarines with respect to them. (Ibid. p. 692.)

Mr. Root later himself explained Article I:

It will be observed that the statement in this treaty of the rules relating to visit and search and seizure does not undertake to state all the rules of international law upon that subject. It was not intended to state all such rules. It was not intended to be a codification of international law relating to visit and search and seizure. The purpose was to state only the most important rules for the protection of innocent life so briefly and simply that every intelligent person could understand them, and to refrain from confusing the unscientific mind by the introduction of the less important details. This was required by the main consideration upon which the treaty relies for its effectiveness. The treaty is not merely a declaration of existing law. It is not merely an agreement between governments resulting from diplomatic negotiation. It is all these, but above all, it is an appeal to the public opinion of mankind to establish and maintain a fundamental rule of morals applied to international conduct in the form of a rule of international law. (Men and Policies, p. 462. Address American Society of International Law, April 27, 1922.)

*Resolution II.*—Resolution II later became Resolution III and finally Article IV of the submarine treaty. As presented on the afternoon of January 5, 1922, it was as follows:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants and to the end that the prohibition of such use shall be universally accepted as a part of the law of nations they declare their assent to such prohibition and invite all other nations to adhere thereto." (Conference on the Limitation of Armament, p. 694.)

Mr. Sarraut then read the following statement:

"The Germans have made war on commerce almost exclusively with their submarines, which were instructed to sink without mercy the merchant vessels of the enemy with the object of destroying that enemy's commerce. The abominable program was made worse by sinking, without distinction, steamers and hospital ships as well as vessels carrying cargo—neutrals as well as those of the enemy. These ships were destroyed without the passengers and crew having been first put in a place of safety. France has already proclaimed and she has reiterated her denunciation of the barbarous methods thus used contrary to the law of humanity and

she has condemned the pitiless destruction of merchant ships as contrary to international law. With these views, the French delegation fully indorses the spirit of Senator Root's resolution and of the amendment proposed by Mr. Balfour. But the delegation considers it desirable that the sentiment of condemnation of the methods employed in the last war should be expressed in the resolution, and for this purpose it suggests the addition of the words 'in the manner that was employed in the last war' at the end of the phrase.

"The first phrase of the resolution would then read as follows:

"'The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants in the manner that was employed in the last war.'"

The chairman said that Mr. Sarraut had called attention to the amendment which had been proposed by Mr. Balfour. The resolution, as it had been read a moment before, had not included that amendment and therefore it should be restated; he would, therefore, read Resolution III with the amendment proposed by Mr. Balfour:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of such use shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves, and they invite all other nations to adhere thereto."

That was the resolution before the committee with the amendment suggested by Mr. Balfour. Mr. Sarraut had suggested that it should also embrace a reference to the methods adopted by the Imperial German Government in the last war, which had received general condemnation. As he understood it, the resolution, with the amendment of Mr. Balfour and the further amendment proposed by Mr. Sarraut, would read as follows:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants in the manner that was employed in the last war, and to the end that the prohibition of such use shall be universally accepted as a part of the law of nations, they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto."

The question before the committee was the adoption of this resolution. Before the discussion proceeded, he wished to ask Mr. Sarraut whether the words which Mr. Sarraut desired inserted, to wit, "in the manner that was employed in the last war," were to be inserted at the place which had been indicated.

Mr. Root said that Admiral de Bon and he had worked out a phrase on the exact line of Mr. Sarraut's and he wondered whether it would not meet the purpose. After the word "violating" the words "as they were violated in the recent war of 1914–1918," should be inserted, so that the resolution would read:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the requirements universally accepted by civilized nations," etc.

The chairman asked whether this wording was agreeable to Mr. Sarraut.

Mr. Sarraut assented.

The chairman said he would read the complete resolution, so that there would be no question upon what action was being taken:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of such use shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves, and they invite all other nations to adhere thereto."

Mr. Balfour said he wished to ask a question in regard to the amendment, now slightly modified, which Mr. Sarraut had proposed and which read as follows:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the requirements universally accepted by civilized nations," etc.

If that were intended merely as an illustration it might be wise or unwise; it might be necessary or unnecessary; at any rate, used in this manner, it could do no harm. It added form and perhaps picturesqueness to the whole resolution. He wished to ask, however, whether it was not possible so to twist the phrase that the article would apply only to German methods. The ingenuity of man for wrongdoing was very great. Was it not unfortunate that the wrongdoers should be hampered only by the methods adopted by the Germans? Would it not be possible

for them to say, "It is true we have used our submarines as commerce destroyers, but we have not used them as the Germans did, and consequently we are not violating this resolution." Perhaps the question he asked was oversubtle, but it appeared to be worthy of consideration.

Mr. Root asked whether that question would not be obviated by simply repeating the words "The use of submarines as commerce destroyers" in the place of "of such use."

Mr. Balfour replied in the affirmative.

The chairman asked whether that amendment was acceptable.

Admiral de Bon said that his reasons, as already stated by Mr. Sarraut, were based upon the fear that the Germans might use the first draft suggested as a pretext to justify some of their actions during the recent war. They might claim that, if the Washington Conference took the ground that it was not possible to use submarines otherwise than in contravention of actual international law, they were in a measure absolved. This was the only idea that he had sought to convey. In his opinion there ought to be a full and complete condemnation of these methods. It was for this reason that the French delegation had desired specifically to object to German practices and thus to remove all possibility of their being able to use the resolution in question to justify their conduct.

The chairman asked whether the amendment as suggested was acceptable. The amendment was that the clause: "To the end that the prohibition of such use shall be universally accepted as a part of the law of nations" should read "to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations."

The chairman said that the reason he asked whether this was acceptable was that it was an amendment to meet the amendment suggested by Mr. Sarraut, and therefore really formed part of the amendment in the line suggested, and he thought it would be well to know whether there was any objection to the amplification of Mr. Sarraut's amendment in that manner.

Mr. Sarraut replied that he had no objection.

The chairman said that in view of what had just been said by Admiral de Bon, it might be well to call attention to the fact that this resolution was not, and did not purport to be, a statement of existing law; it purported to go beyond existing law and to prohibit the use of submarines as commerce destroyers. (Ibid. pp. 694–700.)

The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the require-

ments universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves, and they invite all other nations to adhere thereto. (Ibid. p. 710.)

"*Commerce destroyer.*"—Lord Lee asked what was the precise meaning of the term "commerce destroyer."

He did not know if "commerce destroyer" was a recognized legal term or whether it included the processes of attack and seizure referred to in the first resolution.

Mr. Root said he believed it covered the whole process. He thought that "commerce destroyer" was a perfectly well-known term.

Lord Lee said that doubts were being expressed in his delegation as to the precise meaning of the phrase "commerce destroyer." He asked whether the term "for seizures or attacks on commerce" would not produce the same effect.

Mr. Root said he thought that if the committee undertook to go into the details of the processes, it would find itself involved in statements which were neither clear nor intelligible to the common mind, and that it really did not accomplish its purpose as well as would be done by the use of perfectly well-known terms, such as "commerce destroyers." (Ibid. p. 700.)

* * * * * * *

Mr. Hanihara said he desired to be informed with respect to the exact meaning of the term "commerce destroyer." As he had already pointed out in a previous discussion, he believed that the words were intended to apply to vessels suitable for destruction of merchant shipping. * * *

Mr. Root said he thought that the prohibition would apply to submarines attacking or seizing or capturing or destroying merchant vessels under any circumstances, so long as the vessel remained a merchant vessel; he also thought it was necessary to have an effective prohibition to have it so apply. (Ibid., p. 703.)

*Article IV.*—On January 6, 1922, Mr. Root, discussing what later became Articles I and IV, said of Article IV:

The next resolution, which forbade the use of submarines as commerce destroyers, that was to say, forbade submarines attacking merchant ships, and which if it were to become a part of the law of nations would supersede these other rules so far as submarines were concerned—but which would not supersede them

until it had become a part of the law of nations—was an entirely different proposition. It certainly was not competent for them to make an agreement between the five powers here that would produce the effect of a law of nations upon which they could denounce a punishment as for piracy. (Ibid., p. 722.)

*Presentation to conference.*—On February 1, 1922, at the plenary session at the Conference on the Limitation of Armament, Mr. Root presented the treaty on submarines with the following explanation:

You will observe that this treaty does not undertake to codify international law in respect of visit, search, or seizure of merchant vessels. What it does undertake to do is to state the most important and effective provisions of the law of nations in regard to the treatment of merchant vessels by belligerent warships, and to declare that submarines are under no circumstances exempt from these humane rules for the protection of the life of innocent noncombatants.

It undertakes further to stigmatize violation of these rules, and the doing to death of women and children and noncombatants by the wanton destruction of merchant vessels upon which they are passengers, as by a violation of the laws of war which, as between these five great powers and all other civilized nations who shall give their adherence thereto, shall be henceforth punished as an act of piracy.

It undertakes further to prevent temptation to the violation of these rules by the use of submarines for the capture of merchant vessels and to prohibit that use altogether. It undertakes further to denounce the use of poisonous gases and chemicals in war as they were used to the horror of all civilization in the war of 1914–1918. (Ibid. p. 268.)

*Admiral Knapp's comment.*—A resolution for the appointment of a commission of jurists to consider whether existing rules cover new methods of warfare was adopted at the Conference on the Limitation of Armament, but a later resolution removed from their competence the consideration of submarines and gas warfare. Of this resolution Admiral Harry S. Knapp, United States Navy, writing shortly before his death, said:

But the most extraordinary limitation on the powers of the commission is to be found in resolution No. 2 of the Washington

Conference. This was adopted by the same signatory powers that adopted resolution No. 1 and at the same session. It reads:

"*Resolved*, That it is not the intention of the powers agreeing to the appointment of a commission to consider and report upon the rules of international law respecting new agencies of warfare that the commission shall review or report upon the rules or declarations relating to submarines or the use of noxious gases and chemicals already adopted by the powers in this conference."

Resolution No. 2 can only mean that the delegates of the signatory powers were so entirely satisfied with the work of the conference regarding submarine and gas warfare as to regard it as the last word in form and substance; otherwise they would not have removed the right to review or report upon the rules and declarations of that treaty from the commission they themselves had just created to study the broad question, of which submarine and gas warfare are such integral and outstanding parts.

Such satisfaction is not universally shared. The need for revision of the laws of war is manifest; and it is regrettable that a commission of distinguished jurists should have been called together for that purpose with such a limitation upon their action as that imposed by resolution No. 2. As for treaty No. 2, an attempt is made in what follows to show that it needs revision, especially in respect of its provisions regarding submarine warfare—a revision that The Hague commission would have been so competent to make.

The present criticism of the treaty is not born of any lack of sympathy with its purpose on the part of the writer. On the contrary, he has exerted such influence as he had toward the adoption of a more radical solution of the submarine problem than the treaty attempts. He would prefer to see the submarine abolished. That view has not prevailed, however, and worse still, the Washington Conference failed to put any limitation upon the numbers of submarines, relative or absolute. It consequently failed, potentially at least, to stop competition in submarine building. Under existing circumstances, and having in mind the submarine practices of the Germans during the war—practices that were such a blot upon the German national reputation—it was all-important that any agreement on the subject reached by the Washington Conference should be correct in substance and form; and this is especially true if that agreement was to be the final word on the subject. It was the last word in so far as The Hague commission is concerned; but it can not be doubted that a future conference on the laws of maritime warfare, composed of delegates from all maritime powers so that the voice of the conference will carry real international authority, will refuse to be

shackled by such a limitation as that prescribed by resolution No. 2 of the Washington Conference. (39 Am. Pol. Sci. Rev., June, 1924, p. 203.)

*Report of American delegation.*—In the report of the American delegation to the President on February 9, 1922, there are reprinted certain parts of the report of the advisory committee of twenty-one, and of this report on submarines the delegation says "this report was presented by the American delegation as setting forth in a succinct manner the position of their Government." In this report it was stated:

> The submarine as a man-of-war has a very vital part to play. It has come to stay. It may strike without warning against combatant vessels, as surface ships may do also, but it must be required to observe the prescribed rules of surface craft when opposing merchantmen as at other times. (Conference on the Limitation of Armament. Sen. Doc. No. 126, 67th Cong., 2d sess., p. 814.)
>
> * * * * * * *
>
> The committee is therefore of the opinion that unlimited warfare by submarines on commerce should be outlawed. The right of visit and search must be exercised by submarines under the same rules as for surface vessels. (Ibid. p. 815.)

Immediately following this report is the treaty upon submarines, and as introductory thereto is the following paragraph:

> While the conference was unable either to abolish or to limit submarines, it stated, with clarity and force, the existing rules of international law which condemned the abhorrent practices followed in the recent war in the use of submarines against merchant vessels. (Ibid. p. 815.)

The report also repeats Mr. Root's statement to the conference when, speaking of the submarine treaty and the rules of maritime war, he said:

> It undertakes further to prevent temptation to the violation of these rules by the use of submarines for the capture of merchant vessels, and to prohibit that use altogether. (Ibid. p. 816.)

*Summary.*—Article I of the treaty, aiming as the whole treaty does, to protect the lives of neutrals and noncom-

batants, considers in successive paragraphs visit and search before seizure, attack after refusing visit and search, or to proceed as directed after seizure, destruction without placing personnel in safety, and the application of these so-called universal rules, and adds—

> and if a submarine can not capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested. (Conference on Limitation of Armament, p. 836.)

By this last clause the submarine is required under certain conditions, to desist "from attack and from seizure." Manifestly it is not the purpose to deny the right of visit and search, but, as Mr. Root says, "to declare that submarines are, under no circumstances, exempt from those humane rules for the protection of the life of innocent noncombatants," and Article I itself simply declares "that among the rules adopted by civilized nations" "the following are to be deemed an established part of international law." The discussion in the conference indicates this understanding.

The conclusion is that Article I does not change existing law but, as said in Article II, aims to establish "a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents."

Further in Article III penalty "as if for an act of piracy" is provided for "attacks upon and the seizure and destruction of merchant ships" in violation of these rules.

In the original proposal Mr. Root stated the first resolution as follows: "A merchant vessel must be ordered to stop for visit and search to determine its character before it can be captured." Later, in reply to Mr. Hanihara, who suggested "seize" instead of "capture" in a later paragraph of the same article, Mr. Root said "that the subcommittee understood the word 'capture' to describe the whole process, one step of which was seizure, and it

was intended to make the term 'capture' comprehensive." (Ibid. p. 688.)

It was not understood that this term included visit and search, as by the article itself visit and search must precede capture or seizure, and was to determine the character of the merchant vessel and its liability to seizure or capture.

*Early opinions.*—Visit and search as necessarily preceding seizure or capture has long been recognized. Sir William Scott in the case of the *Maria* in 1799 declared he takes it to be incontrovertible—

> That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visit and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured, it is impossible to capture. . . . In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. (1 C. Robinson, p. 340.)

Similarly in the case of the *Marianna Flora* Mr. Justice Story said of visit and search:

> This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. (11 Wheaton, 1)

No treaty would renounce such a generally recognized right as visit and search, which is the subject of so many treaty agreements, without express stipulation. From a practical standpoint the exercise of visit and search when camouflage or other concealment of identity are possible and much resorted to is essential to the conduct of war on the seas. This seems to be admitted in the first clause of the provisions of Article I which states "a merchant

vessel must be ordered to submit to visit and search to determine its character before it can be seized." Further, it may be said that visit and search does not necessarily imperil " the lives of neutrals and noncombatants " which it is the aim of the submarine treaty to protect.

*German practice, 1914–1918.*—Germany on February 4, 1915, proclaimed the waters about Great Britain and Ireland a war zone in which every enemy merchant ship would, after February 18, " be destroyed without it being always possible to avert the dangers threatening the crews and passengers on that account." Neutral vessels were warned that they were exposed to danger in the war zone, because neutral flags had been used by belligerent merchantmen and because of possible accidents.

In what has been called the " strict accountability " note of Mr. Bryan of February 10, 1915, it was said:

> It is, of course, not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise the right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognized. (Spec. Sup. Amer. Jour. Int. Law, July, 1915, p. 86.)

Germany had previously attempted to justify, on the ground of retaliation, its action, which was admittedly beyond the law, saying:

> Great Britain invokes vital interests of the British Empire which are at stake in justification of its violations of the law of nations, and the neutral powers appear to be satisfied with theoretical protests, thus actually admitting the vital interests of

a belligerent as sufficient excuse for methods of waging war of whatever description.

The time has come for Germany also to invoke such vital interests. It therefore finds itself under the necessity, to its regret, of taking military measures against England in retaliation of the practice followed by England. (Ibid. p. 85.)

In the German note of February 16, 1915, it was said:

Moreover, the British Government have armed English merchant vessels and instructed them to resist by force the German submarines. In these circumstances it is very difficult for the German submarines to recognize neutral merchant vessels as such, for even a search will not be possible in the majority of cases, since the attacks to be anticipated in the case of a disguised English ship would expose the commanders conducting a search and the boat itself to the danger of destruction.

The British Government would then be in a position to render German measures illusory if their merchant marine persists in the misuse of neutral flags and neutral vessels are not marked in some other manner admitting of no possible doubt. (Ibid. p. 94.)

Sir Edward Grey, in a note of February 19, 1915, stated:

The obligation upon a belligerent warship to ascertain definitely for itself the nationality and character of a merchant vessel before capturing it and *a fortiori* before sinking and destroying it has been universally recognized. (Ibid. p. 97.)

*American discussion.*—On February 20, 1915, the United States, anxious to establish a *modus vivendi* between the belligerents, proposed "That neither will use submarines to attack merchant vessels of any nationality except to enforce the right of visit and search." Many notes between the belligerents and the United States were exchanged, and Mr. Bryan, replying on March 30, 1915, to certain British notes, said:

The order in council of the 15th of March would constitute, were its provisions to be actually carried into effect as they stand, a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area and an almost unqualified denial of the sovereign rights of the nations now at peace.

This Government takes it for granted that there can be no question what those rights are. A nation's sovereignty over its

own ships and citizens under its own flag on the high seas in time of peace is, of course, unlimited; and that sovereignty suffers no diminution in time of war, except in so far as the practice and consent of civilized nations has limited it by the recognition of certain now clearly determined rights, which it is conceded may be exercised by nations which are at war.

A belligerent nation has been conceded the right of visit and search, and the right of capture and condemnation, if upon examination a neutral vessel is found to be engaged in unneutral service or to be carrying contraband of war intended for the enemy's government or armed forces. (Ibid. p. 117.)

In the note of April 21, 1915, to the German ambassador, the Secretary of State said of the Government of the United States:

It has, indeed, insisted upon the use of visit and search as an absolutely necessary safeguard against mistaking neutral vessels for vessels owned by an enemy and against mistaking legal cargoes for illegal. (Ibid. p. 128.)

On June 9, 1915, in a note to Germany, the United States said:

Nothing but actual forcible resistance or continued efforts to escape by flight when ordered to stop for the purpose of visit on the part of the merchantman has ever been held to forfeit the lives of her passengers or crew. (Ibid. p. 139.)

The United States has therefore insisted upon the necessity of visit and search before seizure in order to safeguard neutral rights and has denied the right to attack merchant vessels except on the ground of resistance or attempts to escape.

*Review of proposed treaty.*—Article IV of the submarine treaty is a "prohibition of the use of submarines as commerce destroyers."

In reply to Lord Lee's query as to whether "commerce destroyer" was a recognized legal term, or whether it included the process of attack and seizure referred to in the first resolution, "Mr. Root said he believed it covered the whole process. He thought 'commerce destroyer' was a perfectly well-known term." (Conference on Limitation of Armament, p. 700.)

After discussion in the committee on limitation of armament on January 5, 1922, the words "commerce destroyer" were retained instead of substituting the words "submarines for operations against merchant vessels." During this discussion Senator Schanzer said:

> Submarines were military weapons and should be allowed the privileges of military weapons. They might even act in the same way as surface vessels. (Ibid. p. 708.)

The expression "The signatory powers recognized the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants" was deliberately adopted with the understanding that the words "commerce destroyers" "was a perfectly well-known term." This well-known term "commerce destroyers" in the common dictionary sense means a vessel "intended to prey on, capture, and destroy the merchant shipping of an enemy, generally one of high speed and light armament." As this article was adopted at the conference where limitation of naval armament was a prime object, it may be presumed that this meaning of the word was intended, particularly as the phrase in the article is "using submarines as commerce destroyers"; i. e., as light, fast vessels might be used to prey on commerce, or as in 1914–1918 submarines were used putting in peril the lives of neutrals and noncombatants.

According to the final report of the American delegation, quoting from the report of the advisory committee of twenty-one, the opinion of the American Government was that submarines would continue to be used against combatant ships and as scouts, and that "unlimited warfare by submarines on commerce should be outlawed. The right of visit and search must be exercised by submarines under the same rules as for surface vessels." (Sen. Doc. 126, 67th Cong., 2d sess., p. 815.) The report

of the American advisory committee of twenty-one also stated: "If the submarine is required to operate under the same rule as combatant surface vessels no objection can be raised as to its use against merchant vessels." (Ibid. p. 813.) "This report was presented by the American delegation as setting forth in a succinct manner the position of their Government." (Ibid. p. 813.)

Article VI of the proposed treaty in relation to the use of submarines and noxious gases in warfare provided that it should take effect on the deposit of ratifications at Washington by all the signatory powers. Up to the present date, December 31, 1926, these ratifications have not been deposited; therefore the rules governing lawful submarine warfare remain unchanged.

## CONCLUSION

A belligerent submarine lawfully commissioned as a vessel of war may exercise the rights of a vessel of war but its nature gives it no special rights or privileges.

## Situation III

### ANGARY

In case of urgent need, may a belligerent state exercise what was formerly called the right of angary?

### CONCLUSION

In case of urgent need and "in absence of contrary treaty stipulation," a belligerent state may exercise the right of angary.

### NOTES

*Angary.*—The right of angary is in its origin traced to ancient Asiatic sources. In these ancient days it was applied to public taking over of means of transportation on land. Later it was extended to means of transportation on the sea, even on the high sea. In these early days necessity was not always the ground of exercising the right of angary nor was a state of war essential. It was sometimes considered lawful to seize ships for expeditions into unknown regions in time of peace. Compensation was to be paid and the purpose was to be stated. In many treaties, particularly when use in war is the ground, provision is made for advance payment, probably on the theory that the issue of the war might be uncertain, and advance payment removed risk. Many treaties provided for the abolition of all exercise of the right of angary.

Of about 50 treaties mentioning some form of angary or requisition before 1900, only about one-third are unfavorable to the exercise of the right, and of the 5 since 1900, 3 are unfavorable.

*Neutral railway material in time of war.*—Article 54 of Hague Convention II, 1899, was as follows:

> Railway material coming from neutral states, whether the property of those states, or of companies, or of private persons, shall be sent back as soon as possible.

The Second Hague Conference, 1907, in Hague Convention V, article 19, provided:

Railway material coming from the territory of neutral powers, whether it be the property of the said powers or of companies or private persons, and recognizable as such, can be requisitioned and utilized by a belligerent only in the case of, and to the extent demanded by, absolute necessity. It shall be sent back as soon as possible to the country of origin.

A neutral power may likewise, in case of necessity, retain and utilize to a corresponding extent material coming from the territory of the belligerent power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.

In the first report of the second commission reference was made to the difference of opinion on neutral property among the delegations, but it was stated that the majority of the commission was of the opinion that—

Article 54 does not absolutely forbid a belligerent to utilize the material of neutrals found in the territory occupied by its army. It is limited to imposing upon him the obligation to send back this material as soon as possible to the rightful possessor.

On the question of principle raised by the Luxemburg amendments various opinions came to light in the commission and its committee of examination. Some delegations utterly denied that a belligerent has a right of requisitioning and utilizing neutral material found in its territory. Among those who admitted this right within the limits of article 70, some claimed in favor of the neutral state an indemnity as well as the right of retaining, to an equal extent, material belonging to the belligerent. Others were willing to grant to the neutral state only the indemnity without the right of retaining material, or only this right of retention to the exclusion of any indemnity.

It is impossible to reconcile these various opinions, which are contradictory on more than one point. The project contains what may be called an intermediate solution. The first paragraph of article 66, which the German delegation proposed in order to take into account the amendments presented by the delegation of Luxemburg, does not deny the belligerents the right of requisitioning and utilizing material belonging to neutral states or their grantees, but it restricts it to the cases where such a step is demanded by an imperative necessity.

For example, when mobilization takes place, it would be literally impossible to proceed to a separation of all the railway

material belonging to neutral states or their grantees. Even were it thus set apart, this material could nevertheless not be sent to its country of origin as long as the military transportation superseded and checked all other schedules. This situation of *force majeure* might occur even before the opening of hostilities. It could also arise when states are mobilizing their forces with the aim of enforcing respect for their neutrality during a war that has already been declared or one that is imminent.

All that can be done here is to restrict the right of requisition to the narrow limits stated in article 66, paragraph 1, and to recognize the right of the neutral state to the retention reserved to it in the second paragraph of the same article. This right could not be considered as having the character of reprisals. The neutral state will have recourse to it because, deprived of the material retained by the belligerent, it, in its turn, has to requisition the material that it finds in its territory to insure its domestic as well as its international railroad service. It will exercise this right only to the same extent and will be careful, by preserving an even balance between the belligerents, to observe its duty of impartiality which is too inherent in neutrality to require the express mention proposed by the Serbian delegation. Finally, the project imposes on the state making use of the right of requisition, the obligation to pay to the rightful possessors of the material an indemnity proportionate to the material utilized and to the time it is held. In this provision the project merely sanctions a principle which is already practiced everywhere in times of peace and whose application can not, it seems, cause any difficulty. (I Proceedings of the Hague Peace Conferences, Carnegie Endowment for International Peace, p. 157.)

In discussing the rights and exemptions of the means of transportation, Major General von Gündell, of the German delegation, said on August 9, 1907:

Making allusion only in passing to the rights of embargo and of angary which, though disputed, are not yet abolished in common law and which constitute the right of requisition applied to naval war, I call attention to the difficulties of a purely technical nature that stand in the way of fixing such a delay in the domain of railways. While the sea is free for navigation and the voyages of ships are made independently of rails and points so that each ship which is not retained by the authorities can leave port whenever it deems best, railway service is bound by the strictest rules, which can not be violated without running great danger, and that is all the more the case during the mobilization of the army; this is why

it is absolutely impossible to send back neutral material at the moment war is declared without deranging the entire transportation system of mobilization and concentration. (Ibid. Vol. III, p. 218.)

*The World War.*—The World War revived many practices to which there had been little resort in recent wars. Requisitions were mentioned in treaties and other international documents, but the requisitioning of neutral property on land and on water had not been common. The requisitioning of private property on land had been necessary in nearly all wars, but the World War so taxed the resources of all states that extreme measures were taken in many states.

*Law of Turkey, 1916.*—Private vessels of nationals were requisitioned during the World War. In some of these orders for requisition, however, no distinction was made as to the flag which the vessel flies. As an example, the Turkish law of requisition is somewhat more detailed than many. It is evident from article 5 of this law that national vessels are under consideration, as the services of officers and crew may in case of necessity be retained for service. This was sometimes the practice in early times, without regard to the nationality of the crew, but in later times neutral persons have not been compelled to serve, even when the vessels are taken over.

*Turkey, a law on the requisition of the means of transportation, March 13, 1916,*

Article 1. All through the mobilization and in case of necessity the Imperial Government, upon the advice of its Ministers of War and Marine, will proceed to the requisition of all means of transport belonging to individuals and found on seas, rivers, lakes, and canals, as well as their tools and materials.

Art. 2. The means of transport will, upon the request of the War Office or of Admiralty, be requisitioned by the captain of the port, or, in his absence, by the highest civil official of the locality, or by the commanding officer of the Ottoman Imperial Fleet, or by the commander of a man-of-war, or, in a word, by the Ottoman diplomatic or consular officials as well as by any member of the Ottoman Foreign Office. Means of transport will be used for

military purposes and the act of requisition will be notified by writing to the proprietor.

ART. 3. If on board the steamers and vessels requisitioned there are goods not belonging to the company to which the steamer belongs, such goods will be disembarked, and, under the responsibility of the local authorities, will be kept in emporiums designated by the officials mentioned in art. 2. The proprietors will be immediately notified of this act. All damages caused through unloading will be indemnified by the Government. Goods easy to be spoiled ought to be taken away immediately by the proprietor and others must be removed within three months' time after the date of notification given to the proprietor. If not, they will be sold by public auction under the care of officials in charge of these goods. The money realized from the sale will be deposited in the state treasury. If the goods are sold abroad, money received for their sale will be sent to the Ministry of Finances by an official of the Foreign Office.

ART. 4. When the requisition takes place a *procès verbal* will be drawn to that effect, besides an inventory containing the names of all objects and materials belonging to the company, and also those of requisitioned goods will be drawn. The *procès verbal* and the inventory will be written by the functionaries who have effected their requisition, after an understanding in the matter with the proprietor of the goods, the captain or, in his absence, his agent. These documents will be written in duplicate, which will be duly signed and sealed by the two parties interested. A copy of the *procès verbal* and the inventory in question, as well as another *procès verbal*, will be drawn by an expert, containing a list and the value of the goods requisitioned. A copy of the *procès verbal* and the inventory, as well as the *procès verbal* prepared by the expert appointed to estimate the value of the requisitioned objects, will be transmitted to the War Office or the Ministry of Marine. The other copy will be given to the proprietor, or, in his absence, to his agent or captain.

ART. 5. If on board the steamer requisitioned there are officers or crew, who are not liable for military service, such officers or crew will, in case of necessity, be kept to work on board with the same wages as they used to get. On those who are liable for military service, the provisions of the law on military service will be fully applied. The officers and the engineers of the steamer requisitioned, whether liable to military duty or not and who are disabled while in service, will be entitled to infirmity pensions as specified in art. 28 of the law on retirement and military pensions and the amount of the sum to be paid them will be fixed in proportion of the degree of their infirmities. The parents

of those who die in the service will be entitled to pensions specified in art. 28 of the above mentioned law. The provisions of military law on retired officers and men will also be applied on disabled crew and others in conformity with art. 27, and the parents of those who lose their lives while in the service will be entitled, in conformity with art. 36, to a pension.

ART. 6. In case of necessity the requisitioned merchantmen will be turned into and used as warships.

ART. 7. The price to be given for the requisitioned steamers will be determined in accordance with the prescription contained in art. 10, and the amount of indemnity to be paid other than the one mentioned in art. 8 of the present law for freighting steamers as well as other indemnities, such as repairing and salvage expenses, will be fixed by a commission composed of four experts, two of which to be appointed by the War Office and Admiralty, and the two others chosen by the proprietor of the steamers or by their attorneys.

A decision must be given unanimously and, in case of not arriving at an understanding, a fifth expert sent from the tribunal of commerce will join the commission and a *procès-verbal* drawn to that effect will be communicated to the two parties concerned. In case of nonacceptance by one of the parties of the estimates given in the *procès-verbal* an application will be made to the tribunal competent in the matter.

ART. 8. Freight indemnities, such as mentioned above, will be paid, from the date of their requisition, to the proprietor of the means of transport at the following rates: For every boat of 101 to 300 tons, 5 paras per mile, and 4 paras per mile for every ton above 300 tons, for every boat of 301 to 500 tons, 3 paras per ton above 500 tons, for every boat of 501 to 1,000 tons and 2 paras per ton above 1,000 tons for every boat of more registered tons. If the navigation expenses exceed the half of the freight indemnity, surplus together with canal, lighthouse, harbor, dock, and buoy duties will be paid by the Government. All steamers under 100 tons as well as sailing vessels and boats propelled by oars will have freight indemnity paid per day. For an indemnity of 2½ piasters will be paid to all loaded steamers of 500 tons as well as boats of every description detained at anchor, steamers or boats of more than 500 tons will have 50 paras indemnity per day during their detention in a port or harbor.

ART. 9. If the private contracts concluded between the Govern ment and the proprietors of the means of transport do not contain any special and necessary stipulations, the disposition of the present law will at once be applied.

ART. 10. In case the means of transport are damaged, sunk, or transformed into warships, as stipulated in art. 6, a commission composed of experts, as mentioned in art 7, will be formed to fix a sum which the Government will pay in cash as indemnity to the proprietors who will give these means of transport over to the Government. The proprietors will also have the option of either accepting the sum paid as indemnity and continue to be owners of these boats, or take them back after the necessary repairs made by the Government to render them to their former state. But if the cost of repairs will exceed half of the value of the boat, the proprietors will be obliged to transfer it to the Government, in cash, the value of the same fixed by experts, and in case of difficulties arising in coming to an understanding, to accept a price determined by maritime tribunals.

ART. 11. Indemnities, and repairing and salvage expenses are, in conformity with the prescriptions of the present law, to be paid to the proprietor of the means of transport, generally in cash money:

In case of *force majeure* when the payments are postponed and interest of 5% is given to the proprietor of means of transport. On accounts of those whose living depends upon these means of transport settlement can by no means be postponed and are to be settled at once in cash money.

ART. 12. From the date of application of the present law all former ones dealing with the same subject will be abrogated.

ART. 13. The present law will be applied from the date of July 21, 1330 (1914) v. s.

ART. 14. The ministers of war, marine, interior, justice, finances, commerce, and agriculture are intrusted with the execution of the present law.

March 13, 1332.

MEHMED RECHAD.
MEHMED SAID,
*Grand Vizir.*
ENVER,
*Minister of War.*
THALATT,
*Minister of Interior.*
IBRAHIM,
*Minister of Justice.*
A. NESSIMY,
*Minister of Commerce and Agriculture.*

*Lawrence's opinion.*—Lawrence shares Dana's opinion that angary "is not a right at all, but an act resorted to from necessity, for which apology and compensation must

be made at the peril of war." Writing in 1909, Lawrence says:

> We may imagine how fiercely it might be resented, if we contemplate for a moment what would be the consequences of, say, the seizure by the United States Government of all the liners in the port of New-York in order to carry to its destination an expedition against a Central American Republic hastily planned in a sudden emergency. Half the civilized world would suffer, and the other half would make common cause with it. Even the milder manifestations of the power to seize are looked on askance, and provoke so much controversy that belligerent states will be unwilling to resort to them in future. (Principles of International Law, 4th ed., p. 627.)

*United States and Spain, 1902.*—Even the United States in 1902 recognized the possibility of requisition in the treaty with Spain. After exempting citizens and subjects from compulsory military service, Article V provides:

> Furthermore, their vessels or effects shall not be liable to any seizure or detention for any public use without a sufficient compensation, which, if practicable, shall be agreed upon in advance.

*United States and Turkey, 1830.*—The treaty of 1830 between the United States and Turkey, Article VIII, provided:

> Merchant vessels of the two contracting parties shall not be forcibly taken for shipment of troops, munitions, and other objects of war, if the captains or proprietors of the vessels shall be unwilling to freight them.

*German treaties.*—The treaty between Germany and Guatemala in 1887 is a type of many negotiated in the last quarter of the nineteenth century.

> ART. VII. The vessels, cargoes, merchandize, and effects of the citizens of one or the other country shall not be subject to any embargo nor detention for any military expedition whatsoever, nor any public use, without the interested parties, or arbitrators named by them, having previously determined a just and sufficient indemnification in all cases and for all prejudices, losses, delays, and damages occasioned by or resulting from such service.

The treaty between Germany and Colombia is somewhat more detailed:

VII. The people of each of the contracting states shall be exempt from extraordinary war contributions, forced loans, military requisitions, and from military and political services of every kind, in the territory of the other. Nor may their ships, cargoes, goods, and other property be embargoed or retained extrajudicially for military expeditions or for any other purposes. In case such a measure is unavoidable, just indemnity shall be agreed upon with them beforehand. Moreover, they shall in all cases, as regards their real and personal property, be subjected to no other burdens, duties, and imposts than those levied upon the natives and the subjects of the most favored nation.

*Treaty provisions in general.*—A review of a large number of treaty provisions since the eighteenth century shows a great variety of provisions in regard to the use of foreign vessels in time of war, but in general such use is conceded under differing conditions. A few states have aimed for a period to put an end to the right of angary as in the treaty between France and Russia in 1786. Some states have treaties to the opposite effect, even with France, as that with Spain in 1882 by which land transport may be requisitioned after previously agreed compensations. There is no uniformity in treaty provisions.

*Franco-Prussian War, 1870.*—On December 21, and 22, 1870, the Prussian forces at Rouen, "took forcible possession of, and scuttled, 6 British vessels in the River Seine, near Duclair (part of Rouen), where they were lying, taking in ballast for England." The Prussian officer in authority said "he took them as a military requisition." This act became the subject of immediate diplomatic negotiation. Among the early notes exchanged were the following:

No. 12.

*Mr. Odo Russell to Earl Granville.* (*Rec. January 13.*)

VERSAILLES, *January 8, 1871.*

MY LORD: After receiving this morning your lordship's telegram of yesterday afternoon, I called on Count Bismark and again talked

over the question of the 6 British colliers shot at and sunk by the Prussian authorities at Duclair.

His excellency said that he had not yet received a circumstantial account of the transaction, but he found that the law officers held that a belligerent had a full right, in self-defense, to the seizure of neutral vessels in the rivers or inland waters of the other belligerent, and that compensation to the owners was due by the vanquished power, not by the victors.

If conquering belligerents admitted the right of foreigners and neutrals to compensation for the destruction of their property in the invaded state they would open the door to new and inadmissible principles in warfare. Claims for indemnity were submitted to him daily by neutrals holding property in France which he could never admit. He valued, however, the friendship and good-will of England too highly to accept this interpretation of the law in the present case, and preferred to adopt one that would meet the wishes of Her Majesty's Government and give full satisfaction to the people of England.

He deplored the treatment to which the masters and crews of the colliers had been subjected, according to the accounts he had read in the newspapers, and begged I would assure your lordship, with expressions of deep regret, that when the reports from the Prussian authorities had been received he would obtain the King's permission to pay any just compensation to the owners and sufferers your lordship might think right to recommend.

I have, &c.,

ODO RUSSELL.

EARL GRANVILLE.

No. 14.

*Count Bismarck to Count Bernstorff. (Communicated to Earl Granville by Count Bernstorff, February 1)*

[Translation]

VERSAILLES, *January 25, 1871.*

I do myself the honour of transmitting to your excellency, in pursuance of my preliminary communication of the 4th, and my telegram of the 8th instant, a copy of the report from the 1st Army Corps on the sinking of English ships in the Seine, near Duclair, the preparation of which has been delayed by the manifold movements of the corps concerned. Your excellency will find therein, with the same satisfaction as myself, that the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usages. The report shows that a

pressing danger was at hand, and every other means of averting it was wanting; the case was, therefore, one of necessity, which, even in time of peace, may render the employment or destruction of foreign property admissible, under reservation of indemnification. I take the opportunity of calling to mind that a similar right in time of war has become a peculiar institute of law, the *jus angariae*, which so high an authority as Sir Robert Phillimore defines thus: That a belligerent power demands and makes use of foreign ships, even such as are not in inland waters, but in ports and roadsteads within its jurisdiction, and even compels the crews to transport troops, ammunition, or implements of warfare. I hope the negotiation with the owners, for which you are already authorized, will lead to an understanding as to the indemnification for the damage; if not, it would have to be submitted to an arbitrator's award. In the negotiation also the difference in the statements of the 1st Army Corps and of the English consul at Dieppe, as to the number of English vessels sunk, will be explained.

I respectfully request your excellency to communicate this despatch, with its inclosure, to the Secretary of State of Her Britannic Majesty, and to be so good as to express, at the same time, my apology for the delay, as well as my thanks to Her Majesty's Government for the just appreciation of the military necessity with which Lord Granville has apprehended and treated this matter.

BISMARCK.

Count BERNSDORFF.
(Inclosure.)

*Report of the 1st Army Corps on the sinking of ships off Duclair*

[Translation]

The 1st Army Corps having received orders to occupy Rouen with three Infantry brigades (one was left at Amiens) and to secure itself in proper positions in advance on both banks of the Seine against an enemy who was known to be numerically stronger than the Army Corps, the attention of the general in command was the more necessarily directed first of all to the Seine itself, as information had been received that French men-of-war had but a short time before left the port of Rouen.

A close examination of the Seine was therefore ordered, and soundings taken by engineer officers showed that the channel was from 30 to 35 feet deep throughout, and the depth was increased from 4 to 10 feet by the tide.

Several French men-of-war also soon appeared and steamed with the rising tide as far as off Duclair; they returned with

the ebb to Candebec, where most of them remained for the night. Our patrols, where they showed themselves, were hotly fired upon by the men-of-war; hostile detachments were even disembarked on the left bank of the Seine. It is clear that the troops were thereby really endangered in their positions and operations.

It was not only possible for the enemy to flank an advance of our troops on the right or left bank by a direct artillery fire, but a change from one bank to the other was extraordinarily facilitated for the hostile troops—nay, they might even be disembarked in the rear of ours.

According to the statement of competent judges, a large wooden ship, which was stationed in the Seine with two or three small ships, alone held 1,000 troops for landing.

Another considerable evil was that the men-of-war entirely stopped the road to Candebec, as it runs close to the bank at the foot of the steep rocky cliffs.

Finally, the appearance of the men-of-war kept the inhabitants of Rouen in continual excitement, which was the more to be avoided, as the quartering of troops, the closing of the manufactories, etc., already made the temper of the workmen worse from day to day.

Under these circumstances, General von Bentheim ordered Lieutenant Colonel von der Burg, chief of the general staff, to have the Seine completely blocked up. Fresh examinations and conferences with the first engineer officer, Major Fahland, gave the following result:

It is impossible to block up the channel completely by means of the low river ships; this can only be effected by sinking high-built sea ships. The great expense of attaining the end in this manner makes it appear desirable to attempt the blocking up in another and less costly manner; for example:

1. By the formation of batteries which were made near La Fontaine.

2. By torpedoes.

The first measure proved insufficient, as it was soon ascertained that some of the small steamers were armour plated, and the commander had only field artillery at his disposal; the second failed from the want of the requisite materials at the time.

Therefore the only possible means of blocking up the channel was by the sinking of sea ships. So Lieutenant Colonel von der Burg ordered Major Fahland to seize all the sea ships which were off Duclair. This measure was necessary, because if a requisition had been made for the ships to the mayorality here, probably all the ships, timely warned, would have gone to Havre.

All the ships seized immediately hoisted neutral flags, especially English. In the urgency of the matter, researches could not then be made how far the neutral flag covers ships also in rivers, and lying especially between belligerent parties; the suitable ships were pointed out for sinking.

The work began on the 19th of December; altogether 11 ships were sunk, amongst them 7 English ones.

It is hardly worth mentioning that the reports of some French newspapers, stating that the British crews were brutally treated, are quite unfounded. As only three ships were sunk daily, there was time enough to warn the crews to save their papers and effects, which was done. Besides, an order was handed to the captains in which the value of the ship, according to the captain's own statement, was entered.

Finally, it must also be mentioned that, in order to spare the ships as much as possible, the ballast ports only were a little enlarged. Therefore, if they have not been tossed about, and damaged by the ebb and flow in the bed of the Seine, it appears not unlikely that after they are raised they may again be fit for use.

For the general in command.

VON BENTHEIM,
*Lieutenant General and Commander of Division.*

(61 British and Foreign State Papers, pp. 579 et seq.)

In the settlement of the claims of the British shipowners a liberal forced sale price was allowed. Mr. Rothery, of the British admiralty court, said, on April 4, 1871:

It seems now to be generally admitted that the German Govevrnment were entitled, provided that they made full compensation to the owners, to take possession of these vessels, and to sink them for the purpose of protecting themselves against the hostile attacks of French vessels of war; and, moreover, that in the exercise of that right they committed no unnecessary, arbitrary, or offensive acts, although the contrary was at first affirmed. (61 British and Foreign State Papers, p. 600.)

The British Board of Trade made an investigation and fixed the amount due the British owners of the vessels at £7,073 6s. 5d., which was immediately paid by the German Government.

*British regulations, 1913.*—Article 494 of the King's Regulations and Admiralty Instructions, 1913, provides,

If any British merchant ship, the nationality of which is unquestioned, should be coerced into the conveyance of troops or into taking part in other hostile acts, the senior naval officer, should there be no diplomatic or consular authority at the place, is to remonstrate with the local authorities and take such other steps to assure her release or exemption, as the case may demand, and as may be in accordance with these regulations.

This article was drawn before the World War, when the practice was drifting away from the right of angary, and following the decisions of the British prize courts the senior naval officer would now probably hesitate to take extreme action without specific instructions.

*Albrecht's opinion.*—Albrecht, writing in 1912, after reviewing the practice in regard to requisitions, concludes that the English theory has been gaining ground and that it seems plausible and fair. This theory makes neutral goods liable to the same requisitions as belligerent goods if they have become permanently identified with the belligerent national economy. Neutral property temporarily within belligerent territory is to be seized only in case of special need, and then full indemnity is to be paid. Neutral vessels and cargoes are in this category, and when seized under urgent necessity the owner is entitled to compensation under the "modern right of angary." (A. E. Albrecht, Requisitionen von neutralen Privateigenthum, 6 Zeitschrift für Völkerrecht, Sup. I.)

*Forms of angary.*—There seems sometimes to have been positive destruction for war purposes of neutral property by belligerents for which indemnities have been paid, as in the case of the British ships sunk in the Seine in the Franco-Prussian War; sometimes simply employment for war purposes and indemnity has been paid for the employment only, of which there are many examples; and sometimes denial by the belligerent to the neutral of the use of his own property lest the neutral property fall into the hands of the other belligerent or disclose information useful to the other belligerent, as in the case of the British merchant vessel *Labuan*, detained during the Civil War by the United States lest it disclose important

information. All of these acts have been included under the right of angary. The basis of this right seems to be the necessity of the belligerent, extending to the control of property within his jurisdiction.

*Requisition of Dutch ships, 1918.*—Negotiations were carried on in 1917 between the Governments of the allied powers and the Netherlands Government in regard to the use of Dutch merchant vessels by the Allies. A proposed agreement of December 24, 1917, for a *modus vivendi* under which Dutch ships should be used in specified manner was not accepted. This and other propositions led to long and frequent inconclusive discussions. A British memorandum of April 25, 1918, said, in looking back at the course of events:

> Time was going on and, as has already been explained, the lapse of more than two months since the basis of agreement was first arrived at had made an essential difference in the tonnage situation. Nevertheless, the associated governments would, for their part, have greatly preferred to come to an arrangement by mutual agreement, and it was for that reason that another determined effort was made to reach a satisfactory conclusion with the Netherlands Government upon the lines that in return for the 100,000 tons of breadstuffs which the Netherlands Government desired, the tonnage which the associated governments would have received under the agreement should have been made available at once for use either within or without the war zone. This was the proposal which, in form, was accepted by the Netherlands Government on the 17th March. (Parliamentary Papers, Misc., No. 11, 1918.)

The form embodied in a note to the Netherlands, in which the action of the associated governments was made known, was as follows:

(Telegraphic.)

*Mr. Balfour to Sir W. Townley*

FOREIGN OFFICE, *March 21, 1918.*

I request you to make the following communication to the Minister for Foreign Affairs:

"1. After full consideration, the associated governments have decided to requisition the services of Dutch ships in their ports in exercise of the right of angary. They would have preferred to

obtain the use of the ships by way of agreement with the Netherlands Government, and, as your Excellency knows, an arrangement for this purpose was made between representatives of the Netherlands Government and of the associated governments as long ago as the beginning of last January.

"2. Unfortunately the Netherlands Government for more than two months did not see their way to ratify that arrangement. They, moreover, had found it impossible to carry out in all its terms the *modus vivendi* which had been arrived at pending the ratification of the agreement, explaining that the German Government would not allow them to do so. It seemed, therefore, clear to the associated governments that the proposals originally made were not adequate to the present situation. Delay had altered the circumstances. The condition that Dutch shipping was not to be used in the danger zone was no longer acceptable in itself, and might at any time have been made still less so by an extension of the zone by our enemies. Further, the fate of the *modus vivendi* had shown that in the very difficult position in which the Netherlands Government was placed, the execution of the agreement would probably have been attended with difficulties and delays still more prejudicial to the interest of the associated governments.

"3. The associated governments therefore proposed that the limitation on the use of Dutch shipping contemplated under the original scheme should be abandoned, and that, in its altered form, the agreement should come into force immediately. To this the Netherlands Government could not assent, except upon terms which would have made it practically impossible for the associated governments to make any use of the Dutch shipping. To say that shipping shall not be employed for the carriage of war material is at this stage of the war equivalent to saying that it shall not be used at all. For with respect to the great majority of cargoes it is impossible to say that they are not required, directly or indirectly, for the purposes of war.

"4. For these reasons the associated governments have felt compelled to fall back on their unquestionable right to employ any shipping found in their ports for the necessities of war. But they are very anxious that the exercise of this right should be as little burdensome to the shipowners and as little obnoxious to the Netherlands Government as it can be made.

"5. The associated governments hope that it may be possible to arrive at an agreement with the owners as to rates of payment, values for insurance, &c., and on these points a further communication to the Netherlands Government will be sent very shortly. At the end of the war the ships will be returned to their owners,

who will, of course, be compensated for any losses caused among the ships by enemy action. The associated governments are willing, further, to offer the owners, on conditions to be mutually agreed upon, an option to have any ship which may be so lost in the danger zone as it exists at present actually replaced by another ship within the shortest possible period after the conclusion of peace. I need hardly assure your Excellency that all facilities in the power of the associated governments will be given for the repatriation of the crews if desired, and that all precautions will be taken to ensure that they be treated with every courtesy and consideration.

"6. Further, the associated governments hereby give to the Netherlands Government an undertaking that Dutch ships which may leave a Dutch port *after* the date of this communication shall not be brought into allied services otherwise than in agreement with the owners.

"7. The associated governments having been informed that, unless the stock of food grain now in the Netherlands be replenished in time, Holland is threatened with a serious shortage during the third quarter of this year, will at once place at her disposal 50,000 tons of wheat (or an equivalent quantity of flour) or other breadstuffs in a North American port and 50,000 tons in a South American port. It is hoped that the Netherlands Government will immediately send out such part of the tonnage remaining in Holland as may be necessary to lift this grain. The associated governments guarantee that as far as it is in their power these ships shall enjoy immunity from delay and detention, and receive every facility for bunkering.

"8. The United States Government have already intimated that the steamship *New Amsterdam* at present in New York will not be utilised by them, and will, under the special arrangement covering it, be allowed not only to return at once to Holland but to load a cargo of foodstuffs consisting of rice and coffee. This cargo will be composed of the original cargoes of the steamship *Samarinda* and the steamship *Adonis*, which would have been allowed to proceed to Holland if the *modus vivendi* already referred to had come into operation.

"9. As regards further supplies of cereals, foodstuffs, raw materials, and all other articles, the importation of which is provided for in the proposals for the general arrangement, the associated governments are willing to give Dutch vessels now in Dutch ports every facility for their importation into Holland in accordance with the list and the terms of the general agreement, if the Netherlands Government are ready (as the associated governments hope they are) to signify their acceptance of its terms generally.

"10. The associated governments believe that the Dutch ships now in their ports do not fully correspond with the tonnage to whose services they had hoped to become entitled under the terms of the proposed general arrangement, and that the vessels now in, or on their way to, Dutch ports will be found to exceed the tonnage needed for the imports of the Netherlands and their colonies calculated on the basis of the original tonnage proposals provisionally agreed by the Dutch delegates. If, contrary to this expectation, it should be proved to the satisfaction of the associated governments that this is not the case, the latter will be ready to make up any deficiency in the tonnage left at Holland's disposal on the lines of the various provisions of the general arrangement covering the use and distribution of Dutch tonnage as soon as the Netherlands Government shall have supplied the allied governments with definite figures of the tonnage now in or on the way to Dutch ports." (Parliamentary Papers, Misc., No. 11 [1918], p. 2.)

The Netherlands Government objected to the position taken by the associated governments, and in a reasoned argument said:

In the first place, I must remark that the Queen's Government, as your Excellency knows, in no way agree to the interpretation now given to the right of angary, an ancient rule unearthed for the occasion and adapted to entirely new conditions in order to excuse seizure *en masse* by a belligerent of the merchant fleet of a neutral country. This measure, which only rests on force, is unjustifiable, whether one is pleased to give it the name of "requisitioning of services" or any other label destined to conceal its arbitrary character, and if its application be limited or not to the duration of the war or mitigated in its details so as to make it more supportable. The so-called right of angary is the right of a belligerent to appropriate as an exception a neutral ship for a strategical end of immediate necessity, as, for example, to close the entrance of a seaport so as to hinder the attack of an enemy fleet. Application of this right to a fleet *en masse* is an interpretation entirely arbitrary and incidental ("*d'occasion*"). (*Ibid.* p. 3.)

Of this communication from the Netherlands Government Mr. Balfour said, on April 25, 1918:

It is true that the British note of the 21st March, bases the requisitioning of these ships on the right of angary, but it appears to make little difference whether the act of requisitioning is treated as founded on that right or upon the general right of sovereignty over all persons and property within the jurisdiction.

It would appear that the Netherlands Government consider the right of angary to be an ancient rule, which has fallen into desuetude until it was unearthed by His Majesty's Government as justifying an arbitrary act on their part. The right is certainly an ancient one, and its existence has been recognized, though admittedly in some cases with reluctance, by nearly all writers on international law, from Grotius downwards. It is sufficient to refer to Bluntschli, Massé, Vinnius (*ad* Peckium), Bonfils, Calvo, Halleck, Rivier, Heffter (especially note by Geffcken in the fourth French edition), Hall, Phillimore, Westlake, and Oppenheim. But if it is suggested that the right has fallen into disuse and is obsolete, it is fair (without quoting extensively from the many modern writers on international law who recognize the right as still existing) to point out that it was asserted by the German Government and acquiesced in by His Majesty's Government in 1871; that it is especially mentioned in the United States Naval War Code of 1900; and that during the discussions at the Naval War College in 1903, which resulted in the withdrawal of the Code, it was not suggested that the article in question required any modification. Further, the right was fully recognized during the present war, before any cases had arisen of the requisitioning of neutral ships which were not the subject of prize court proceedings, by the judicial committee of the privy council in the well-known case of the *Zamora*. (Ibid. p. 9.)

and further in the same memorandum Mr. Balfour says:

It is a commonplace that the rights of a sovereign State extend over all property within its jurisdiction, irrespective of ownership, and neutral property within belligerent jurisdiction is, in the absence of special treaty stipulations, as liable to requisition in case of emergency as the property of subjects. If demonstration of this fact were required, it would be afforded by the circumstance that it is not an uncommon provision in commercial treaties that the property of the subjects of the contracting parties shall be exempt from military requisition in the territory of the other. Vessels calling at a foreign port are, in the absence of special treaty provisions, fully subject to the local jurisdiction. A striking example of this is the practice under which such a vessel can be arrested by reason of legal proceedings in the courts of the country which she is visiting, and detained there by order of those courts until the proceedings are finished, or she obtains her release on bail. This being so, it is not surprising that a practice should have grown up of exercising this right in the particular case where the State in question has urgent need of neutral property such as shipping within its jurisdiction, and the fact that the exercise of

this right has received a particular name should not obscure the truth that it is a legal exercise of the right of a sovereign State, and not an act by a belligerent based on no principle of law, and for which the only justification is to be found in usage. (Ibid. p. 11.)

*The taking over by the United States of Dutch ships.*— The United States had been concerned in the negotiations with the Netherlands through representatives of the War Trade Board. The United States took over the Dutch ships under a presidential proclamation of March 20, 1918, and took over possession of tackle, etc., by an Executive order of March 28, 1918.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas the law and practice of nations accords to a belligerent power the right in times of military exigency and for purposes essential to the prosecution of war to take over and utilize neutral vessels lying within its jurisdiction;

And whereas the act of Congress of June 15, 1917, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for the other purposes," confers upon the President power to take over the possession of any vessel within the jurisdiction of the United States for use or operation by the United States:

Now therefore, I, Woodrow Wilson, President of the United States of America, in accordance with international law and practice, and by virtue of the act of Congress aforesaid, and as Commander in Chief of the Army and Navy of the United States, do hereby find and proclaim that the imperative military needs of the United States require the immediate utilization of vessels of Netherlands registry, now lying within the territorial waters of the United States; and I do therefore authorize and empower the Secretary of the Navy to take over on behalf of the United States the possession of and to employ all such vessels of Netherlands registry as may be necessary for essential purposes connected with the prosecution of the war against the Imperial German Government. The vessels shall be manned, equipped, and operated by the Navy Department and the United States Shipping Board, as may be deemed expedient; and the United States Shipping Board

shall make to the owners thereof full compensation, in accordance with the principles of international law.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia, this twentieth day of March, in the year of our Lord one thousand nine hundred and eighteen, and of the independence of the United States of America the one hundred and forty-second.

WOODROW WILSON.

By the President:
ROBERT LANSING,
*Secretary of State.*

EXECUTIVE ORDER

In pursuance of the authority conferred upon the President of the United States by the act approved June 15, 1917, entitled "An act making appropriations to supply urgent deficiencies for the fiscal year ending June 30, 1917, and for other purposes," the Secretary of the Navy is hereby authorized and directed to take over, on behalf of the United States, possession of all tackle, apparel, furniture, and equipment, and all stores, including bunker fuel, aboard each of the vessels of Netherlands registry now lying within the territorial jurisdiction of the United States, possession of which was taken in accordance with the proclamation of the President of the United States promulgated March 20, 1918; and in every instance in which such possession has heretofore been taken of such tackle, apparel, furniture, equipment, and stores, such taking is hereby adopted and made of the same force and effect as if it had been made subsequent to the signing of this Executive order.

The United States Shipping Board shall make to the owners of any tackle, apparel, furniture, equipment, and stores taken under the authority of this order full compensation in accordance with the principles of international law.

WOODROW WILSON.

THE WHITE HOUSE, *March 28, 1918.*

## The Netherlands Government published on March, 30, 1918, a statement showing its attitude upon the taking over of the vessels by the United States.

The Dutch Government and the whole Dutch people have taken note with painful surprise of the proclamation and statement of the President of the United States of March 20 relative to the seizure of part of the Dutch mercantile marine. The seizure

*en masse* of a neutral mercantile fleet, although merely for the duration of the war, is an act which is indefensible from the point of view of international law and apart from legal considerations is unjustifiable when taken against a friendly nation. Furthermore the manner in which the act of violence is defended in the President's statement does not contribute to making it any the less grievous, for the defense has clearly been set up under the influence of an entirely wrong conception of the facts.

The manner in which the Dutch mercantile fleet has been treated for months past in the United States, the interminable difficulties placed in the way of our vessels' departure from American ports, the continually repeated refusal of bunker coal, the enforced unloading of cargoes already purchased—all of this may not be in conflict with the rights of the United States, with the exception of one case, that of the *Zeelandia*, which entered an American port with her own bunker coal and has been detained there illegally ever since, but it was nevertheless in conflict with the traditional friendship between the two countries. This, however, is merely said in passing. On this point, however, the statement is silent.

According to the presidential statement Holland is said not to have fulfilled entirely, because of German pressure, the provisional agreement which has been proposed in order that, pending a definite agreement relative to tonnage and the rationing of our country, our vessels lying in American ports should no longer lie there idle but be given an opportunity of making a voyage of 90 days at the most. This is absolutely incorrect, as is the assertion that Germany is said to have threatened to sink the two vessels which were to leave here in return for the two vessels leaving for Holland with America's approval and that Germany made more and more serious threats in order to prevent compliance with the *modus vivendi* as well as the conclusion of a permanent peace. (Staats Courant, March 30, 1918, translated in Official Bulletin, U. S. April 13, 1918, p. 2.)

To this the United States said:

The Netherlands Government have issued a statement relative to the recent action of the Government of the United States in putting into its service for the period of the present war emergency certain privately owned vessels of Netherlands registry lying within the territorial jurisdiction of the United States. While this action is referred to as being indefensible from the standpoint of international law the statement of the Netherlands Government does not argue the question of legality. Nor is this Government disposed to do so. The practice of nations and the opinions of

jurists on the right of a belligerent to utilize all vessels which come voluntarily and unconditionally within its jurisdiction are sufficiently well known to render citation of precedent and of authority unnecessary. (Official Bulletin, U. S., April 13, 1915, p. 1.)

*Action of other states.*—The action of other states in Europe and in South America in taking over before and during the World War German merchant vessels while called by Germany "a strange violation of right" was approved in practice.

*General.*—Early and late practice has shown resort to the exercise of the right of angary. Treaties have implied the right to take over vessels upon payment of indemnity. Proclamations and diplomatic papers have given the right full recognition as the French Minister of Marine declared on November 18, 1917, angary is lawful "in presence of imperative and urgent need for the national defense and in absence of contrary treaty stipulations."

## CONCLUSION

In case of urgent need and "in absence of contrary treaty stipulation" a belligerent state may exercise the right of angary.

## Situation IV

### AIRCRAFT IN NEUTRAL PORTS

States X and Y are at war. Other states are neutral. An aircraft carrier of State X enters a port of State Z with 10 aircraft on board.

A cruiser of State X has on board a disabled aircraft which it desires to transfer to the carrier in exchange for an aircraft in good condition, and to take from the aircraft carrier aircraft fuel and certain parts for repairing disabled aircraft.

May State Z legally decline to permit within its jurisdiction the transfer of the aircraft or the supply of aircraft fuel or parts?

### SOLUTION

State Z may legally decline to permit within its jurisdiction the transfer of aircraft or of aircraft fuel or parts.

### NOTES

*Development of regulations.*—The development of regulations relating to aerial warfare has naturally followed the development of instruments of aerial warfare. At different times it has been vigorously maintained that all aerial warfare should be prohibited as a method of placing a limitation on war. Some of the supporters of this argument have contended that an international agreement to confine warfare to land and sea contests and not to extend war to the air would limit armament and the range of hostilities, and that such agreement prior to the extensive preparation for aerial warfare would secure the status quo, avoiding competition in air armament. Some states, however, have been confident that the more economical and effective defense for their territory is by

aircraft, rather than other means. States have accordingly taken advantage of the progress in aviation for military purposes. The call for the peace conference at The Hague in 1899 provided in the first four suggested topics for limitations on aerial and other war.

*Discharge of projectiles from balloons, Hague regulations.*—The First Hague Conference, in 1899, made the following declaration.

> The contracting powers agree to prohibit, for a term of five years, the discharge of projectiles and explosives from balloons or by other new methods of similar nature.

This same prohibition was renewed at the Second Hague Conference, in 1907, except that the words "five years" were changed to "for a period extending to the close of the Third Peace Conference."

The essential proposition relating to principle was the prohibition of "the discharge of projectiles and explosives from balloons or by other new methods of similar nature."

*Attitude toward declaration of 1899.*—The declaration of 1899 prohibiting the discharge of projectiles or explosives from aircraft for a period of five years was ratified by most of the 26 States participating in The Hague Conference of 1899. Great Britain did not ratify this declaration before 1907. Turkey signed but did not ratify. It expired by limitation in 1904 and was not renewed, though the subject was revived at the conference of 1907.

*Hague discussion, 1907.*—Some of the discussion at The Hague has been considered in the Naval War College International Law Situations, 1912, pages 56–92. These discussions of 1912 were rather with reference to specific situations and not with reference to the general subject.

At The Hague conference of 1907 the Belgian delegate proposed the renewal of the declaration of 1899 to the effect that—

The contracting powers agree to prohibit, for a term of five years, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

The Austro-Hungarian delegates, supporting the Belgian proposition, said:

Nous pensons que le résultat tactique que l'on peut obtenir à l'aide de ces engins n'est point suffisant pour justifier la perte de vies, le dommage matériel ainsi que les dépenses causés par leur emploi.

Il est vrai que ni les belligérants, ni les neutres, ne seront à même de défendre leut droit de souveraineté sur les zônes atmosphériques qui leur appartiennent et leurs frontières aériennes, d'une manière aussi efficace que leurs populations et leurs biens.

Mais le nouveau moyen de guerre mentionné dans la Déclaration, n'est *pas indispensable;* et cette circonstance nous permet d'espérer avec certitude que l'espirt d'humanité et de paix, qui plane en pensée, dominante sur cette assemblée, dont elle inspire les décisions—esprit auquel nous avons même déjà sacrifié mainte exigence militaire—se manifestera aussi ici, par l'adoption pour une série d'années limitée, de la mesure, que préconise la proposition belge.

Nous ne désirons nullement entraver les progrès de la science, mais ne voudrions pas en encourager une application qui, sans offrir d'avantage tactique suffisant, augmenterait encore les cruautés de la guerre. (Deuxième Conférence Internationale de la Paix, Tome III, p. 151.)

The Russian delegate proposed to make a permanent agreement as to the prohibition of the discharge of projectiles from balloons against undefended places. The Italian delegation introduced an amendment to the same effect. This part of the regulation was embodied in article 25 of the Laws and Customs of War on Land, prohibiting the attack or bombardment by any means whatever of undefended places.

The Italian delegation also proposed to distinguish among aircraft, suggesting the following:

Il est interdit de lancer des projectiles et des explosifs du haut de ballons qui ne sont pas dirigeables et montés par un équipage militaire.

General de Robilant, in a somewhat long speech, supported the Italian propositions, saying among other things that:

Par la Déclaration de 1899 on interdisait pour un temps déterminé l'usage d'une arme nouvelle qu'on désignat vaguement, vu qu'il était question de ballons ou d'autres modes analogues nouveaux. Cette Déclaration évidemment ne pouvait avoir qu'un caractère provisoire, et représentait exactement l'incertitude qui règnait alors sur la dirigeabilité des ballons et sur la possibilité de l'obtenir.

Depuis lors la situation a changé, une grande puissance, dont l'industrie a toujours été à la tête de tous les progrès, a résolu le problème qui hantait depuis longtemps les hommes de science, et grâce aux moteurs puissants et légers que lui offrent les nouvelles applications de la mécanique et de la métallurgie, elle a trouvé moyen de construire un ballon qui évolue aussi aisément dans les airs qu'un navire sur la mer.

Les autres puissances la suivent de très près leurs ingénieurs s'acharnent dans un labeur ininterrompu á trouver des solutions peut-être meilleures que celles qui existent déjà, et il est probable qu'ils y parviendront. Le progrès n'a point de limites, et ce qui nous étonne et nous paraît extraordinaire aujourd'hui, nous semblera naturel et même banal demain.

Dans ces conditions, du moment où il n'a pas été possible d'interdire d'une façon absolue, quoique pour un temps limité, l'usage des ballons pour certains actes de guerre, mieux vaut le restreindre et le discipliner pour toujours.

Tout progrès scientifique a toujours trouvé son application à l'art militaire; dès qu'on a appris à diriger et à conduire des navires, on s'est empressé de les armer pour l'attaque et la défense; des wagons blindés et armés de canons ont été vus parcourant les chemins de fer dans certaines guerres récentes; demain on aura des automobiles cuirassés armés de canons à tir rapide, si la chose n'est pas déjà faite et il deviendra de plus en plus difficile, comme on l'a vu, d'interdire aux ballons d'être armés à leur tour et de se servir de leurs armes. (Ibid. p. 155.)

Of the 35 delegations voting, 21 votes were favorable, 8 were opposed, and 6 abstained from voting.

The principles of the Italian proposals were embodied in other conventions and the declaration of 1899 was reaffirmed, though the states have been slow to ratify it, but have devoted themselves to the perfecting of their

aircraft and training a military personnel to use them efficiently.

*General restrictions.*—The Hague Laws and Customs of War on Land contain in article 22 the statement that "The right of belligerents to adopt means of injuring the enemy is not unlimited." In 1899, the main argument against the use of aircraft was that their movements could not be controlled with sufficient certainty so that the probability of injury to the enemy would be wholly out of proportion to the suffering that might be caused. Needless suffering was so far as possible to be restricted.

*Attitude toward declaration of 1907.*—The attitude prior to the World War toward the declaration of 1907 prohibiting the discharge of projectiles and explosives from aircraft may be seen in the reluctance of states to ratify this declaration. Only 15 of the 44 states ratified. Of the European states Austria-Hungary and Great Britain, with some of the smaller states, ratified. Germany, France, Italy, Russia, and Spain were among the European states that did not ratify. The United States ratified the declaration. Japan did not ratify. This situation showed that the leading states and many of the smaller states were for the most part disinclined to sign a declaration limiting their right to the free use of aircraft within the laws of war.

*Other restrictions on use of aircraft.*—Beside the declaration prohibiting the discharge of projectiles and explosives from balloons, there are clauses in other Hague agreements which restrict aerial warfare. An amendment to article 25 of the Laws and Customs of War on Land was drawn with the express purpose of applying to aircraft, though it is doubtful whether it accomplished this object. It is as follows, the words in italics being introduced in 1907 as amending the clause of 1899:

> The attack or bombardment *by any means whatever* of towns, villages, or buildings which are not defended is forbidden.

In the use of aircraft from ships it is also reasonable that the rules in regard to naval bombardment should, so far as possible, apply. The restriction in all cases prohibits attack on undefended and unfortified places. Presumably provision should be made for marking by signs visible from above hospitals and public edifices, as in case of naval bombardment.

The prohibition in regard to projectiles discharging asphyxiating or deleterious gases would apply for most states, though the United States did not ratify this declaration of 1899.

The same may be said of the declaration prohibiting expanding bullets.

*Institute of International Law, 1911.*—At Madrid in 1911, the Institute of International Law, after long discussion, voted upon the status of aircraft in time of peace and in time of war. The regulation voted for the time of war was,

> La guerre aérienne est permise, mais à la condition de ne pas présenter pour les personnes ou les propriétés de la population pacifique de plus grands dangers que la guerre terrestre ou maritime. (24 Annuaire de l'Institut de Droit International, p. 346.)

The discussion at Madrid showed a strong sentiment in favor of absolute prohibition of aerial war over land and sea, while at the same time it recognized such a prohibition would be impossible owing to the progress in aerial navigation.

The British members were generally favorable to limitation, and Professor Holland advocated complete prohibition of aerial warfare. Professor Westlake's proposition prohibiting the use of aircraft in time of war except for observation purposes was supported by many members of the institute.

After the discussion had been carried on for a long time

> M. Ed. Rolin déclare qu'il admet le principe de la "guerre aérienne," conformément à l'opinion défendue par M. le Rapporteur et entre autres par MM. Politis et Errera. Sans doute l'Institut doit rendre hommage aux considérations humanitaires élevées dont

s'inspirent MM. Westlake, Alb. Rolin et de Labra; mais l'Institut ne doit pas oublier qu'il est une assemblée de jurisconsultes; il doit donc examiner la question qui lui est soumise à un point de vue juridique. Or, le principe essentiel des régles de la guerre est que toute cruauté inutile est interdite. Si l'on veut proscrire l'emploi des aéronefs comme moyen de guerre, il faut démontrer au préalable que les aéronefs sont des engins inutilement cruels; à défaut de cette démonstration, il faut admettre que la guerre aérienne est licite.

M. le Rapporteur s'associant aux observations de M. Ed. Rolin fait valoir que la guerre aérienne est infiniment moins aveugle que la guerre maritime à certains points de vue: or, l'Institut vient d'admettre l'emploi des mines sous-marines; s'il proscrit celui des aéronefs, on ne manquera pas de considérer cette décision comme illogique. (Ibid. p. 341.)

Several propositions were put to vote. The amendment of Professor Holland, "Tout acte d'hostilité, y compris les actes d'observation, d'exploration ou de communication de la part d'un belligérant, par le moyen d'aéronefs, sont interdits" (ibid. p. 343), was rejected by a vote of 17 to 5.

The proposition of Messrs. Westlake, Alberic Rolin, and Fiore, "Les actes de guerre, sauf ceux d'exploration, d'observation, de communication, sont interdits aux aéronefs" was rejected by a vote of 15 to 9.

Professor von Bar offered a somewhat detailed regulation. This was as follows:

Article 1. En général il est interdit de se servir des aérostats, ballons ou aéroplanes comme moyens de destruction ou de combat.

Art. 2. Toutefois:

(*a*) Les aérostats, ballons ou aéroplanes militaires ennemis, si l'on tire sur eux (par des canons placés à terre ou à bord d'un vaisseau) peuvent se défendre.

(*b*) Les combats en l'air sont permis:

(1) S'il y a combat naval et que les aérostats, ballons ou aéroplanes ne sont éloignés que de vingt kilomètres du lieu du combat.

(2) Dans les mers territoriales des belligérants dans une zône de blocus.

(3) Dans les sphères aériennes enveloppant les territoires des belligérants.

Professor von Bar's proposition was divided for the purpose of vote, and some parts were approved while other parts were rejected. When the proposition as a whole came before the institute, it was rejected by a vote of 13 to 10.

The regulation was finally approved by the institute to the effect that—

> Aerial warfare is permitted, but on condition that it shall not involve for peaceful persons and property greater danger than land or maritime warfare.

There were 14 votes for and 7 votes against this regulation.

*Attitude of the Interparliamentary Union.*—The subject of aerial warfare was particularly brought to the attention of the Interparliamentary Union in 1912 through a proposition of M. Beernaert of Belgium, who had been a member of the Hague Conferences and was familiar with the course of discussion. He proposed that—

> La XVII[e] Conférence interparlementaire invite le Conseil à faire instituer une Commission de sept membres, chargée d'étudier les questions relatives à l'emploi de la navigation aérienne en temps de guerre au point de vue militaire, et notamment:
>
> I. D'examiner:
>
> A) S'il y a lieu de provoquer l'interdiction conventionnelle de l'emploi des appareils de navigation aérienne connus ou à inventer encore;
>
> B) Si, dans tous les cas, semblable emploi ne devrait pas être exclusivement réservé aux Etats, la course aérienne devant être interdite au même titre que la course maritime;
>
> C) Si, dans l'hypothèse où l'emploi comme instrument de combat serait prohibé, il y aurait lieu, dans des buts d'utilité militaire, d'autoriser des opérations de vérification, d'investigation ou de contrôle; de déterminer dans ce cas les conséquences de semblable emploi pour les appareils y affectés, tant au point de vue de leur propre défense et d'hostilité éventuelle entre eux, que pour la protection des régions terrestres ou maritimes ainsi exposées;
>
> II. D'étudier les conséquences budgetaires d'un emploi des appareils de navigation aérienne soit comme instruments de combat, soit comme moyens de reconnaissance. (Compte Rendu de la XVII[e] Conférence, 1912, p. 16.)

In a report after reviewing the progress of regulation of aerial navigation and the restriction upon aerial warfare, M. Beernaert said:

Sans méconnaître le fondement de ces observations, quelques-uns estiment qu'une interdiction absolue n'aurait guère de chance d'être admise et qu'en renonçant à faire des ballons un engin de guerre, il conviendrait de tenir compte de précédents déjà séculaires et de continuer à en autoriser l'emploi en vue de fournir aux armées d'utiles renseignements sur les forces et les mouvements de leurs adversaires.

Tel fut l'avis exprimé à Madrid par MM. de Bar, Meurer, A. Rolin, Holland, Westlake, etc., et déjà M. L. Bourgeois avait défendu le même sentiment dans son discours d'overture de la session de Paris de l'Institut de droit international. Pascal Fiore y a adhéré.

Il faut reconnaître qu'une telle distinction, louable en elle-même, entraînerait certaines difficultés. Les ballons d'une armée se trouveraient presque aussitôt en présence de ballons de l'adversaire, et dès lors quel serait leur rôle? Interdirait-on aux uns et aux autres tout acte d'hostilité réciproque et serait-il défendu de tirer sur eux de terre, en leur attribuant ainsi une sorte d'immunité assez difficile à expliquer? Ou se bornerait-on à ne leur permettre qu'un tir horizontal et l'emploi de balles telles qu'avant de tomber sur le sol, elles devraient avoir perdu toute efficacité?

Cette dernière condition semblerait, dans tous les cas, déjà commandée par les conventions en vigueur au sujet des lois de la guerre. Il est, en effet, interdit d'occasionner aucun dommage aux non-belligerants, et les combattants doivent ménager absolument, en mer, les vaisseaux neutres, et à terre, une série d'etablissements et d'institutions d'intérêt public géneral. Il fraudrait donc qu'au moins dans ces limites les aviateurs fussent maîtres de leur tir, ce qui, pensons-nous, n'est pas encore le cas.

Une autre question d'ordre plutôt subsidiaire mériterait encore de fixer l'attention de l'Union parlementaire.

S'il faut s'incliner devant les progrès de la science, même lorsqu'ils sont meurtriers, si la guerre des airs pouvait être considérée comme un mal inévitable, ne faudrait-il pas au moins que sous toutes leurs formes, avions et dirigeables, fissent l'objet d'un monopole de l'Etat?

Il y a longtemps que nous poursuivons l'interdiction de la course en mer et, sans doute, on serait d'autant plus d'accord pour la proclamer dans le domaine de l'air, que l'on n'aperçoit guère ni les profits qu'on en pourrait tirer, ni les conditions techniques dans lesquelles elle pourrait s'exercer.

Mais, à notre sens, cela ne suffirait pas. Nous estimons que de tels moyens de nuire, et à l'égard desquels la surveillance et la répression serait si difficiles, ne pourraient être laissés à la disposition de particuliers, si sévère que pût être la réglementation à leur imposer. (Ibid. p. 129.)

In the course of consideration of the report of M. Beernaert much discussion was stirred up by the speech of Baron d'Estournelles de Constant, who was known as a strong friend of peace and a warm supporter of the development of aviation. The part of his speech to which special attention was directed was as follows:

Oui, il est odieux, il est révoltant de penser que la première action d'une admirable création comme celle de l'aviation permettant à l'homme de s'élever dans le ciel, serait de se servir de l'aéroplane pour tuer l'homme, pour verser le sang, pour commettre des meurtres. Et je suis d'accord avec vous. Ne croyez pas que je sois devenu à mon tour inhumain, pour penser que c'est une espèce de profanation de l'aviation que de la faire servir a la destruction humaine.

Nous sommes donc d'accord, c'est entendu. Mais jusqu'au jour où vous aurez appliqué une règle qui puisse s'étendre non pas seulement à l'aviation, mais à tous les autres moyens de destruction, où vous aurez organisé votre défense nationale dans tous les pays, de telle sorte que ce ne soit pas seulement l'aviation qui soit frappée, je maintiendrai mon opinion. Si vous voulez frapper comme création du génie humain l'aviation, si vous voulez frapper cette application que vous considérez comme funeste, je vous le demande, pourquoi est-ce que vous ne frappez pas aussi, pourquoi n'interdisez-vous pas également toutes les autres applications qui sont, après tout, aussi funestes, aussi détestables? Pourquoi est-ce que vous n'interdisez pas l'usage des explosifs, les applications de la science chimique? Pourquoi est-ce que vous n'interdisez pas les torpilles, les mines, les torpilleurs, les sous-marins, les submersibles? Pourquoi est-ce que vous n'interdisez pas même les automobiles car il y a chez nous, comme dans tous les grands Etats militaires, il y en a en Allemagne et dans d'autres Etats, les automobiles militaires cuirassés; il y a tout ce qu'on peut imaginer de plus néfaste dans cet ordre d'idées? Pourquoi donc ne les interdisez-vous pas aussi? Pourquoi n'interdisez-vous pas l'innocente bicyclette qui peut servir, après tout, au meurtre? Pourquoi n'interdisez-vous pas la télégraphie sans fil qui peut, bien plus criminellement encore qu'un aéroplane, par l'ordre d'un homme, par l'ordre d'un chef qui peut se tromper, qui

peut abuser de son pouvoir, déterminer au loin un massacre? Pourquoi donc? Où est la logique? Pourquoi n'interdisez-vous pas avec le télégraphie sans fil, les communications par ces ondes inconnaissables et qui se développent tous le jours et qui permettent de transmettre non pas seulement le son, non pas seulement la lumière, mais la force elle-même qui pourrait déterminer des explosions à distance, faire sauter un cuirassé, une forteresse. Tout cela vous les tolérez, sauf l'aviation. Je dis que vous commettez une grande faute. (Ibid. p. 261.)

The position of M. Beernaert was maintained by a very large vote, and the position of M. d'Estournelles de Constant received comparatively few votes.

A vote was also passed looking to the renewal of the convention prohibiting the discharge of projectiles from aircraft.

*Development of aircraft.*—While balloons were used in the eighteenth century, the development of aerial navigation has been particularly rapid since 1907. Not all states have developed along the same lines, though of course the progress in one state has not been overlooked by others. Germany paid special attention to the perfecting of balloons (dirigibles) which carry heavy burden and sustain a long flight. France emphasized flight by heavier-than-air machines.

As aircraft have developed, new uses have been devised. They have been found particularly useful in some states for locating mines and submarines. With the introduction of radio, the use of aircraft for observation purposes has been much extended. The increasing range of flight and speed has made it possible to report the movements of troops on land and of ships at sea even when at a great distance.

The actual firing upon ships and upon troops has become fairly common. Flights to bridges, depots of supplies, remote towns, etc., have shown the possibilities of the use of aircraft.

It is now clearly established, in spite of earlier opposition, that those using aircraft for the purpose of making observations are not to be treated as spies, but if captured

can only be treated as prisoners of war. This position is the proper one, as there is no deceit involved in this service, and the penalty in case of spying is based on the clandestine nature of the service.

The use of aircraft to disperse troops, as reported in the Turco-Italian War in 1911, was very successful. Upon troops at that time unaccustomed to such instruments of war the effect was terrifying before any projectiles were discharged. After explosives were dropped, many sought flight at once on the reappearance of aircraft.

Even States which had signed the declaration prohibiting till the close of the proposed 1915 Third Hague Conference the discharge of projectiles from aircraft were busy perfecting aircraft, usually under the supervision of military authorities. The World War, which demonstrated the great utility of aircraft, made prohibition improbable. On the other hand, since 1918 great progress has been made in the development of this arm of the military service in many countries.

*Internment in World War.*—During the World War for the first time the question of aircraft in relation to neutral jurisdiction became one of great practical importance. While practice was not, at first, in every instance uniform, gradually it came to be recognized that belligerent aircraft had no right to enter neutral jurisdiction. Some of the neutral states for a time questioned the necessity of denying entry to aircraft, and considered permitting entry on terms analagous to those applied to maritime vessels of war. Switzerland and the Netherlands, from their geographical position as neutral islands surrounded by belligerents, had to face the problem in more varied manifestations. Both states maintained the right to use necessary force to prevent entrance of belligerent aircraft or even to intern aircraft entering under *force majeure.* Disabled belligerent aircraft, aircraft trying to escape from the enemy, aircraft lost in fog or

storm, were with their personnel forced to land and interned by neutral states. Early in the war there was some uncertainty in regard to hydroplanes in Norway, and later Denmark permitted some German deserters to remain after entering Danish jurisdiction in a stolen aircraft. The Netherlands interned American aircraft alighting within Dutch jurisdiction after a battle over the high sea with Germans. The Swiss authorities similarly interned American fliers when returning from an observation flight and forced by motor trouble to land within Swiss jurisdiction. There were many cases in which the crews were interned when the aircraft were destroyed either intentionally or by accident. When aircraft personnel was rescued on the high seas and brought within neutral jurisdiction, the practice was usually to release them.

*Italian decree, 1914.*—While Italy was still neutral a royal decree was issued September 3, 1914:

ARTICLE 1. It is forbidden for any apparatus or means of aerial locomotion, such as dirigibles, aeroplanes, hydroplanes, balloons, flying kites, or captive balloons, etc., to fly or ascend over any points of territory of the state or colonies or of the territorial seas, except for those established by military authorities and for other aeronautics that are authorized from time to time by the ministers of war and navy. No permission will be granted to any foreigners.

ART. 2. The surveillance of the territory of the state and territorial seas is entrusted to military and naval authorities, to the royal revenue guards, to the coast guards, to the police, and to the political and municipal authorities. Appropriate directions and instructions will be issued from the proper departments. The surveillance over territories of the colonies and over the seas is entrusted to military and naval authorities designated by the governors.

ART. 3. No unauthorized device or means of aerial locomotion, for any reasons whatever, shall make flights over territories but shall descend immediately. Whenever they disregard signals, either over land or sea, to descend, any military officials or Government agents which have been designated by the Government, are authorized to fire upon them, or use any other means found necessary to enforce the above orders.

ART. 4. The military apparatus and those privately authorized to fly shall carry some distinctive mark, which shall be easily visible from the earth, such marks to be established by proper regulations.

ART. 5. The signals to be made to those aerial machines that do not carry such distinctive marks will be as follows: i. e., by waving flags—either white or equally visible color—or by the firing of a gun or by the firing of rockets. Such signals will be repeated at frequent intervals.

*Commission of jurists, 1923.*—Under the treaty of the Conference on the Limitation of Armament providing for the commission of jurists to consider the rules of warfare, the powers later agreed to limit the work of the commission which assembled December 11, 1922, to rules relating to aerial warfare and the use of radio in time of war. The commission finished its work February 19, 1923, though it said if the "rules are approved and brought into force, it will be found expedient to make provision for their reexamination after a relatively brief term of years to see whether any revision is necessary." (1924 N. W. C. Int. Law Documents, p. 97.)

In the report of the commission of jurists it was said in regard to belligerent duties:

To avoid any suggestion that it is on the neutral government alone that the obligation is incumbent to secure respect for its neutrality, article 39 provides that belligerent aircraft are under obligation to respect the rights of neutral powers and to abstain from acts within neutral jurisdiction which it is the neutral's duty to prevent.

It will be noticed that the article is not limited to military aircraft; in fact, the second phrase will apply only to belligerent aircraft of other categories, as it is they alone which may remain at liberty within neutral jurisdiction. All aircraft, however, including military, are bound to respect the rights of neutral powers.

ARTICLE 39

Belligerent aircraft are bound to respect the rights of neutral powers and to abstain within the jurisdiction of a neutral State from the commission of any act which it is the duty of that State to prevent.

The principle that belligerent military aircraft should not be allowed to enter or circulate in neutral jurisdiction met with

ready acceptance. It is in conformity with the rule adopted by the European States during the recent war.

The immunities and privileges which article 17 confers on flying ambulances will enable the neutral State to admit them to its jurisdiction, if it sees fit.

ARTICLE 40

Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State. (Ibid. p. 131.)

It will be noticed that article 39 applies to "belligerent aircraft" while article 40 applies to "belligerent military aircraft" only. Article 39 includes all aircraft entitled to fly the belligerent's flag. Article 40 includes "belligerent military aircraft" only, and does not cover flying ambulances, other public aircraft such as those engaged in the postal or police service, or private aircraft.

Spaight says of recognizing in time of war rules which have prevailed in time of peace,

> In the first place, rules which have been agreed after careful consideration for times of peace ought also to be applicable to times of war unless, and except in so far as, they can be shown to be rendered unsuitable to the changed conditions which war brings about. In the second place, many signatory states are fairly certain to remain entirely outside the struggle in the event of a war, however great, and as between these states the convention will remain in force. It would obviously be inconvenient if the rules governing classification and marks applicable as between these nonbelligerent states were entirely inconsistent with those applicable as between them and the states to whom they stand in the relation of neutrals to belligerents. For these reasons the jurists at The Hague in 1923 followed so far as possible in their rules for the classification of aircraft those already laid down in the convention of 1919. (Air Power and War Rights, p. 92.)

Switzerland and other States found it necessary during the World War to prohibit the entry of all aircraft within its jurisdiction. The possibility of maintaining neutrality in any other manner is doubtful when the nature of aircraft is considered. A night flight over a neutral territory makes it difficult to determine anything definite in regard to the aircraft, and even under favorable condi-

tions aerial control is not easy. If the neutral State is to be secure in the observance of its obligations, the safe procedure will probably be to prohibit the entrance of all aircraft, to require landing at designated places, or otherwise to assure itself of the character of each aircraft.

There are the further problems arising in consequence of easy conversion of aircraft from private to public military service, or vice versa, which may give rise to complications. Certain recent proposals for regulation of aerial navigation have not given these problems consideration.

*Aircraft on board vessels of war.*—Military aircraft on board vessels of war under most of the recent codes may be permitted to enter a foreign jurisdiction in time of peace or in time of war. Usually military aircraft are not permitted to fly freely over foreign territory, even in time of peace, and in time of war risks might be much greater. It has been maintained that the interpretation of the words "on board" should be that the entire support of the aircraft should be the physical structure of the vessel of war.

There has been some difference of opinion as to whether an aircraft carrier should be classed as a vessel of war. The treaty limiting naval armament of the Washington Conference, 1921–22, stated, "An aircraft carrier is defined as a vessel of war with a displacement in excess of 10,000 tons (10,160 metric tons) standard displacement, designed for the specific and exclusive purpose of carrying aircraft." The principal naval powers accept the above definition, so that it may be said that at present an aircraft carrier is a vessel of war.

Aircraft on board a vessel of war would under present conditions be regarded as a part of the fighting equipment of the vessel. As a torpedo might be a part of the equipment for sending a projectile through water, so aircraft might be similarly regarded for the air. Either might properly be classed as a part of the equipment of

the vessel for war. An aircraft carrier might be wholly or almost entirely equipped with aircraft, while a vessel of war of another type might have torpedoes, heavy guns, aircraft, etc. It might be presumed by a neutral that the torpedo, projectile, or aircraft would be separated from the vessel of war only for belligerent purposes, and that when separated from the vessel of war, the responsibility of the neutral in regard to them would be distinct from that for the vessel of war as a unit with its equipment on board.

*Report of Commission of Jurists, 1923.*—The status of aircraft on vessels of war was considered by the commission of jurists in 1922–23, and their report makes certain explanations in proposing article 41:

> The customary rules of international law authorise the admission of belligerent warships to neutral ports and waters. There is no obligation upon neutral states to admit warships belonging to belligerent states, but it is not in general refused. The admission of belligerent military aircraft, however, is prohibited by article 40, and account must therefore be taken of the fact that it has now become the practice for warships to have a certain number of aircraft assigned to them and that these aircraft usually rest on board the warship. While they remain on board the warship they form part of it, and should be regarded as such from the point of view of the regulations issued by the neutral states. They will therefore be allowed to enter the neutral jurisdiction on the same footing as the warship on board which they rest, but they must remain on board the warship and must not commit any act which the warship is not allowed to commit.

ARTICLE 41

> Aircraft on board vessels of war, including aircraft carriers, shall be regarded as part of such vessels. (1924 N. W. C. Int. Law Doc. p. 132.)

*Conclusion of the report of the commission.*—The report of the commission of jurists, 1923, in no way prevents the purchase of contraband as a commercial transaction, and in this category would be aircraft fuel and aircraft parts. The supply of aircraft fuel or parts to a belligerent aircraft on a vessel in a neutral port would,

however, not be such a transaction as is provided for in article 45, the comment upon which is as follows:

> No obligation rests on a neutral state to prevent the purchase by a belligerent government of articles of contraband from persons within the neutral jurisdiction. The purchase of contraband under such conditions constitutes a commercial transaction which the neutral government is under no obligation to prevent, although the opposing belligerent may take such means as international law authorises to intercept the delivery of the articles to his enemy. This principle has already been embodied in article 7 of the convention concerning the rights and duties of neutral powers in land war (Convention V of 1907) and in article 7 of the corresponding convention for maritime war (Convention XIII of 1907). To apply it to aerial warfare, the following article has been adopted:

ARTICLE 45

> Subject to the provisions of article 46, a neutral power is not bound to prevent the export or transit on behalf of a belligerent of aircraft, parts of aircraft, or material, supplies, or munitions for aircraft. (1924 N. W. C. Int. Law Doc. p. 134.)

The supply of war material within a neutral port does not leave the opposing belligerent any means to intercept. Therefore the obligation rests upon the neutral state to use the means at its disposal to prevent such supply. Similarly, the transfer of aircraft from one belligerent vessel to another in a neutral port would not be for any other than military reasons, and should be prevented.

*Neutral jurisdiction.*—The laws of war on land in general provide that belligerent troops may not enter neutral territory, and that if belligerent troops enter upon neutral territory they are to be interned. Vessels of war are, however, usually permitted innocent passage through neutral waters and entrance to neutral ports for a sojourn of not to exceed 24 hours. Belligerent vessels in neutral ports are, of course, secure from attack, even to a greater degree than in their own ports, and are under obligation not to abuse the hospitality for warlike purposes.

The general discussion of the relations of neutrals, particularly in conflicts involving maritime jurisdiction,

was set forth in the report of the Commission on the Rights and Duties of Neutral Powers in Naval War at The Hague Peace Conference in 1907. As translated this report in part reads:

Land warfare regularly pursues its course on the territory of the belligerents. In exceptional circumstances alone is there any direct contact between the armed forces of a belligerent and the authorities of neutral countries; when such contact does take place, as when troops flee into neutral territory, the situation is relatively simple; customary or written positive law applies in a well-defined manner. The case is otherwise in naval war. The war vessels of the belligerents can not always remain in the theatre of hostilities; they need to enter harbours, and they do not always find harbours of their own countries nearby. Here geographical situation exerts a powerful influence upon war, since the ships of the belligerents will not need to resort to neutral ports to the same extent.

Does it result from this that they have a right to unrestricted asylum there and may neutrals grant it to them? This is contested. The distinction just indicated is the natural consequence of what takes place in time of peace. Armed forces of one country never enter the territory of another state during peace. So when war breaks out there is no change, and they must continue to respect neutral territory as before. It is different with naval forces, which are in general permitted to frequent the ports of other states in time of peace. Should neutral states when war breaks out brusquely interrupt this practice of times of peace? Can they act at their pleasure, or does neutrality restrain their liberty of action? While it is understood that when belligerent troops penetrate neutral territory they are to be disarmed, because they are doing something which would not be tolerated in time of peace, the situation is different for the belligerent warship that arrives in a port which it has customarily been able to enter in time of peace and from which it might freely depart.

What reception, then, is this ship to meet with? What shall it be allowed to do? The problem for the neutral state is to reconcile its right to give asylum to foreign ships with its duty of abstaining from all participation in hostilities. This reconciliation, which is for the neutral to make in the full exercise of its sovereignty, is not always easy, as is proved by the diversity of rules and of practice. In some countries the treatment to be accorded belligerent warships in neutral ports is set forth in permanent legislation, e. g., the Italian code on the merchant marine; in others rules are promulgated for the case of each particular war by proclama-

tions of neutrality. And not only do the rules promulgated by the several countries differ, but even the rules prescribed by a single country at different times are not identical; moreover, sometimes rules are modified during the course of a war.

The essential point is that everybody should know what to expect, so that there will be no surprise. The neutral states urgently demand such precise rules as will, if observed, shelter them from accusations on the part of either belligerent. They decline obligations that would often be disproportionate to their means and their resources or the discharge of which would require on their part measures that are veritably inquisitorial.

The starting point of the regulations ought to be the sovereignty of the neutral state, which can not be affected by the mere fact that a war exists in which it does not intend to participate. Its sovereignty should be respected by the belligerents, who can not implicate it in the war or molest it with acts of hostility. At the same time neutrals can not exercise their liberty as in times of peace; they ought not to ignore the existence of war. By no act or omission on their part can they legally take a part in the operations of war; and they must moreover be impartial. (Reports of the Hague Peace Conferences, Carnegie Endowment, p. 839.)

*XIII Hague Convention, 1907.*—Article 1 of XIII Hague Convention concerning the rights and duties of neutral powers in naval war provides:

Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral powers which knowingly permitted them, a nonfulfillment of their neutrality.

In commenting on the principle enunciated in article 1, the commission showed that it was not a principle arising in consequence of the existence of war but "inherent in the very existence of states," and, further, the commission said:

The principle is applicable alike to land warfare and to naval warfare, and we are not surprised that the regulations elaborated by the second commission on the subject of the rights and duties of neutral states on land begin with the provision: "The territory of neutral states is inviolable."

Generally speaking, it may be said belligerents should abstain in neutral waters from any act which, if it were tolerated by the

neutral state, would constitute failure in its duties of neutrality. It is important, however, to say here that a neutral's duty is not necessarily measured by a belligerent's duty; and this is in harmony with the nature of the circumstances. An absolute obligation can be imposed upon a belligerent to refrain from certain acts in the waters of a neutral state; it is easy for it and in all cases possible to fulfill this obligation whether harbours or territorial waters are concerned. On the other hand, the neutral state can not be obliged to prevent or check all the acts that a belligerent might do or wish to do, because very often the neutral state will not be in a position to fulfill such an obligation. It can not know all that is happening in its waters and it can not be in readiness to prevent it. The duty exists only to the degree that it can be known and discharged. This observation finds application in a certain number of cases.

Sometimes it is asked whether a distinction should be made between harbours and territorial waters; such a distinction is recognized with respect to the duties of a neutral, which can not be held to an equal degree of responsibility for what takes place in harbours subject to the direct action of its authorities and what takes place in its territorial waters over which it has often only feeble control; but the distinction does not exist with respect to the belligerent's duty, which is the same everywhere. (Ibid. p. 840.)

This convention also makes other provisions in regard to the belligerent obligations, as in article 18:

Belligerent ships of war can not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

Of this article 18 the commission in its report said:

According to the second rule of Washington a neutral Government is bound not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

All were agreed that this rule should be retained, and several proposals include it to a greater or less degree. The only discussion was on the point whether it was necessary to mention territorial waters as well as ports and roadsteads.

The affirmative was adopted by 8 votes (United States, Brazil, Spain, France, Great Britain, Italy, Japan, Turkey); Germany, Denmark, Norway, Netherlands, Russia, and Sweden did not vote.

It has been said that a practice forbidden in ports and roadsteads could not be permitted in territorial waters. This is particularly true because the point of view taken is that of what belligerents may not do. The provision is thus justified more easily than that of the Washington rule which speaks of the obligation of the neutral government. (Ibid. p. 858.)

*Transfer in neutral jurisdiction.*—An aircraft on board a vessel of war or aircraft carrier is regarded as a part of such vessel as long as it remains on board, in the same manner as a gun would be so regarded. When it is separated from the vessel of war upon which it enters the neutral port it is no longer a part of that vessel. The exchange would not be made except to render the cruiser more efficient as a fighting vessel. If the transfer were to be allowed in the neutral port it could be with greater safety than on the high sea or even in a national port of the belligerent. If such transfers were to be allowed, a neutral port might become the rendezvous for aircraft carriers and cruisers for exchange of disabled and able aircraft, which in effect would be a base of military equipment. The report of the commission of jurists, 1923, provides, in referring to what was formerly known as the rule of " due diligence " mention in article 46:

An exception to the principle that a neutral state is under no obligation to prevent the export of arms and war material, is found in the accepted rule of international law that neutral territory must not be utilised as a base of operations by a belligerent government, and that the neutral state must therefore prevent the fitting out or departure from its jurisdiction of any hostile expedition intended to operate on behalf of one belligerent against the other. Such an expedition might consist of a single aeroplane, if manned and equipped in a manner which would enable it to take part in hostilities, or carrying on accompanied by the necessary elements of such equipment. Consequently, its departure under circumstances which would constitute the despatch of a hostile expedition, must be prevented by the neutral government. (1924 N. W. C. Int. Law Doc. p. 134.)

*Unseaworthy vessels of war.*—Unseaworthy vessels of war may usually be repaired in a neutral port to make them again seaworthy. Even the boats of a vessel of

war have been allowed necessary repairs. During the World War neutrals prescribed rules in regard to the sojourn of vessels of war for repairs. Brazil allowed vessels of war to remain longer than 24 hours "if the repairs necessary to render the ship seaworthy can not be made within that time," but in article 13 it was further provided:

> The belligerent warships are allowed to repair their damages in the ports and harbors of Brazil only to the extent of rendering them seaworthy, without in any wise augmenting their military power. The Brazilian naval authorities will ascertain the nature and extent of the proper repairs, which shall be made as promptly as possible. (1916 N. W. C. Int. Law Topics, p. 11.)

Rule 13 of the neutrality proclamation of the United States relating to the Panama Canal Zone, November 13, 1914, stated:

> The repair facilities and docks belonging to the United States and administered by the canal authorities shall not be used by a vessel of war of a belligerent, or vessels falling under rule 2, except when necessary in case of actual distress, and then only upon the order of the canal authorities and only to the degree necessary to render the vessel seaworthy. Any work authorized shall be done with the least possible delay. (Ibid. p. 99.)

The ship's boats are necessary for transporting the personnel to and from the vessel of war, for exercising the right of visit, and for other purposes not involving warlike action, and repair to such craft has been permitted in neutral ports as rendering the vessel of war seaworthy and not adding to its fighting strength.

*Washington Conference, 1921–22.*—In the report of the subcommittee on aircraft which was submitted to the committee on limitation of armament, January 7, 1922, it was said in regard to the question of the use of military aircraft:

> It is necessary in the interests of humanity to lessen the chances of international friction, that the rules which should govern the use of aircraft in war should be codified and be made the subject of international agreement.

40. The matter has been considered by this committee in connection with a draft code of "Rules for aircraft in war" submitted for remarks by the subcommittee on the laws of war. The subject appears to the committee to be one of extreme importance and one which raises far-reaching problems, legal, political, commercial, and military; it requires therefore exhaustive discussion by a single committee in which experts on all these issues are assembled.

The representatives of the United States and Japan on this committee are prepared to discuss the rules submitted from a technical point of view as provided for in the agenda under the paragraph on limitation of new types of military arms, but the representatives of Great Britain, France, and Italy are not so prepared. They state that the time between receipt of the agenda of the conference and their date of sailing has not permitted that exhaustive discussion of the subject which would enable them to advance a national viewpoint on a matter which affects so many and varied interests. In some cases the national policy has not yet been determined.

41. This committee recommends therefore that the question of the rules for aircraft in war be not considered at a conference in which all the members are not prepared to discuss so large a subject, but that the matter be postponed to a further conference which it is recommended be assembled for the purpose at a date and place to be agreed upon through diplomatic channels. (Conference on the Limitation of Armament, p. 774.)

The final conclusion of the subcommittee was:

*Number and character.*—The committee is of the opinion that it is not practicable to impose any effective limitations upon the numbers or characteristics of aircraft, either commercial or military, excepting in the single case of lighter-than-air craft.

*Use.*—The committee is of the opinion that the use of aircraft in war should be governed by the rules of warfare as adapted to aircraft by a further conference which should be held at a later date. (Ibid. p. 780.)

A resolution was adopted by the conference, February 4, 1922, establishing a commission of jurists to consider amendment of the laws of war. It provided:

The United States of America, the British Empire, France, Italy, and Japan have agreed:

I. That a commission composed of not more than two members representing each of the above-mentioned powers shall be constituted to consider the following questions:

(a) Do existing rules of international law adequately cover new methods of attack or defense resulting from the introduction or development, since The Hague Conference of 1907, of new agencies of warfare?

(b) If not so, what changes in the existing rules ought to be adopted in consequence thereof as a part of the law of nations?

II. That notices of appointment of the members of the commission shall, within three months after the adjournment of the present conference, be transmitted to the Government of the United States of America which after consultation with the powers concerned will fix the day and place for the meeting of the commission.

III. That the commission shall be at liberty to request assistance and advice from experts in international law and in land, naval, and aerial warfare.

IV. That the commission shall report its conclusions to each of the powers represented in its membership.

Those powers shall thereupon confer as to the acceptance of the report and the course to be followed to secure the consideration of its recommendations by the other civilized powers. (Ibid. p. 1640.)

It was also resolved by the conference:

That it is not the intention of the powers agreeing to the appointment of a commission to consider and report upon the rules of international law respecting new agencies of warfare that the commission shall review or report upon the rules or declarations relating to submarines or to the use of noxious gases and chemicals already adopted by the powers in this conference.

This last resolution left as the main problem for the commission of jurists that of aerial warfare, even though the treaty relating to the use of submarines and noxious gases was not ratified by all the powers.

*Status of rules as to aircraft in peace.*—The rules for the use of aircraft in time of peace have gradually developed with the progress of aviation. The convention for the regulation of aerial navigation, signed at Paris October 13, 1919, stated generally accepted principles for the time of peace, and by article 38 provided: "In case of war the provisions of the present convention shall not affect the freedom of action of the contracting states, either as belligerents or as neutrals." The first article

declared, however, that "the high contracting parties recognize that every power has complete and exclusive sovereignty in the air space above its territory." This being true in the time of peace would be unquestioned in the time of war.

*World War practice.*—During the World War states exercised the right to exclude aircraft altogether.

Switzerland made its position as a neutral clear in the ordinance of August 4, 1914:

17. As to aviation, attention will be given to what follows:

(a) Balloons and aircraft not belonging to the Swiss Army can not rise and navigate in the aerial space situated above our territory unless the persons ascending in the apparatus are furnished with a special authorization, delivered in the territory occupied by the army, by the commander of the army; in the rest of the country, by the Federal military department.

(b) The passage of all balloons and aircraft coming from abroad into our aerial space is forbidden. It will be opposed if necessary by all available means and these aircraft will be controlled whenever that appears advantageous.

(c) In case of the landing of foreign balloons or aircraft, their passengers will be conducted to the nearest superior military commander who will act according to his instructions. The apparatus and the articles which it contains ought, in any case, to be seized by the military authorities or the police. The Federal military department or the commander of the army will decide what ought to be done with the personnel and matériel of a balloon or aircraft coming into our territory through *force majeure*, and when there appears to be no reprehensible intention or negligence. (1916 N. W. C. Int. Law Topics, p. 73.)

The proclamation of the United States relating to the neutrality of the Panama Canal Zone, November 13, 1914, stated:

RULE 15. Aircraft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction. (Ibid. p. 99.)

*Aircraft on vessels of war.*—It has been maintained that aircraft are analogous to the boats of a vessel of war, and may be used in transporting the personnel of the

vessel of war to and from shore in the same manner that the ship's boats are used. This might be true in some cases if conditions were favorable, and sometimes also it might be possible to use aircraft from the deck of a vessel to fly to the neighborhood of a merchant vessel at sea. At present, however, such is not the purpose for which space is given up to aircraft on board a vessel of war, and such is not the reason for the careful training of aircraft personnel. There would be no sound military argument for carrying aircraft on vessels of war merely to take the place if conditions were favorable of the ship's boats.

*Fuel and supplies.*—It has long been admitted and is embodied in many conventions and proclamations that fuel and supplies may be afforded in a neutral port, but not more often than once in three months. XIII Hague Convention, rights and duties of neutral powers in maritime war, provided:

ART. 19. Belligerent ships of war can not revictual in neutral ports or roadsteads except to complete their normal peace supply.

Similarly these vessels can take only sufficient fuel to enable them to reach the nearest port of their own country. They may, on the other hand, take the fuel necessary to fill up their bunkers properly so called, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral power, ships are not supplied with coal until twenty-four hours after their arrival, the lawful duration of their stay is extended by twenty-four hours.

ART. 20. Belligerent ships of war which have taken fuel in a port of a neutral power can not within the succeeding three months replenish their supply in a port of the same power.

The United States in 1914 issued proclamations of neutrality containing the following provisions in regard to supplies and fuel:

No ship of war or privateer of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the sub-

sistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive if dependent upon steam alone, and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a port of the government to which she belongs. (1916 N. W. C. Int. Law Topics, p. 86.)

*Fighting strength.*—It had been well understood that repairs involving increase of fighting strength were not to be made in neutral ports. Before the World War, regulations and proclamations had made this evident. In the Danish royal order of December 20, 1912, concerning the neutrality of Denmark in case of war between foreign powers, it was stated, in article 5, a:

All repair relating to the fighting capacity of the vessel is prohibited. The authorities concerned indicate which repairs to be accomplished and when completed the vessel leaves as soon as possible.

## CONCLUSION

While the rules in regard to the treatment of aircraft and vessels bearing aircraft have not been fully agreed upon, it may be presumed that the general principles embodied in rules for the conduct of warfare will not be greatly modified. The application of accepted rules will necessarily be adapted to the changing methods and means of warfare. Neutrals will observe these rules when clearly set forth, and in absence of clear rules will probably apply for regulation of conduct of aircraft, parallel and analogous rules to those for the regulation of other means of transportation and observation. The use of a neutral port for the purpose of increasing the fighting strength of a vessel has been in general prohibited. The

transfer of aircraft in a neutral port from one vessel of war of X to another vessel of war of State X may be presumed to be to increase the fighting capacity of one of the vessels, and the same may be presumed in the transfer of aircraft fuel and parts.

SOLUTION

State Z may legally decline to permit within its jurisdiction the transfer of aircraft or of aircraft fuel or parts.

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